(23,028)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 173.

JACOB WEINMAN AND JOSEPH BARNETT AND IVAN GRUNSFELD AND M. W. FLOURNOY, THEIR SURETIES, PLAINTIFFS IN ERROR,

vs.

RICHARD DE PALMA AND BERNARD RUPPE.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

INDEX.

	Original.	Print
Writ of error	a	1
Citation and service	b	1
Clerk's certificate and return to writ of error	c	2
Caption	1	2
Transcript from the district court of Bernalillo county	2	2
Caption	2	2
Complaint	2	2
Answer of Joseph Barnett	6	4
Deed, Weinman *et ux.* to Barnett, July 25, 1902	11	7
Release, Weinman *et ux.* to Barnett, July 23, 1902	13	8
Answer of Jacob Weinman	15	9
Answer of plaintiffs to new matter in answer of Barnett	18	11
Motion for bill of particulars	20	12
Order for bill of particulars	22	13
Bill of particulars	23	13
Order granting leave to file amended reply, &c	30	19
Motion to strike out parts of answer of Barnett, &c	31	20
Order on motion to strike out, &c	33	21

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 1, 1913.

	Original.	Print
Amended reply to answer of Barnett	34	22
Demurrer to answer of Weinman	37	23
Reply to answer of Weinman	38	24
Motion of Weinman to strike out parts of reply	39	24
Order on motion of Weinman to strike out parts of reply	42	26
Order granting new trial	42	26
Entry of empaneling of jury in part	43	27
Entry of empaneling of jury concluded, &c	49	30
Order continuing trial	52	33
Orders continuing trial	53	33
Orders continuing trial	54	34
Orders continuing trial	55	35
Order discharging jury	56	35
Motion of Barnett for leave to file amended answer	56	36
Notice of hearing on motion	57	36
Amended separate answer of Barnett	58	37
Amended separate answer of Weinman	62	39
Order submitting motions to file amended answers	66	41
Order denying motions to file amended answers	66	42
Order beginning trial	67	42
Order continuing trial	68	43
Order continuing trial	69	43
Order continuing trial	70	44
Orders continuing trial	71	45
Order continuing trial	72	46
Order continuing trial	73	46
Order concluding trial	74	47
Verdict	74	47
Special verdict	75	48
Note of filing verdict	79	50
Note of filing motions for new trial	79	50
Order overruling motions for new trial	80	51
Judgment	81	51
Order granting appeal	82	52
Supersedeas bond	83	53
Order extending time to settle bill of exceptions	86	55
Præcipe for transcript	87	55
Bill of exceptions	89	56
Motion of Weinman for continuance	90	57
Motion of Barnett for postponement	90	57
Reply to motions, &c	91	57
Challenge of jury, &c	95	59
Testimony of Neill B. Field	97	60
O. N. Marron	117	69
A. B. McMillen	117	70
John Venable	119	71
Plaintiffs' Exhibit A—Deed, Goldstein to Weinman, December 30, 1889	124	73
B—Deed, Weinman to de Palma *et al.*, November 9, 1901	128	75

	Original.	Print
Testimony of Pitt Ross	132	77
James McCorriston	202	111
A. W. Hayden	210	115
Aban Sandoval	222	122
Joseph L. La Driere	253	137
Plaintiffs' Exhibit I—Specifications for foundations	268	144
J—Agreement between Barnett and Weinman, May 6, 1902	272	146
K—Agreement between Grande and Barnett, June 5, 1902.	276	149
Testimony of Bernard Ruppe	282	151
Plaintiffs rest	552	283
Motion for verdict for Weinman	552	283
Motion of Barnett to strike out, &c	553	283
Motion for verdict for Barnett and Weinman, &c	560	286
Defendants' case	564	288
Testimony of John Tascher	564	288
Levi R. Thompson	570	291
Defendants' Exhibit I—Schedule of real and personal property of R. de Palma	578	295
Testimony of Ed. Steiner	582	298
Charles Swanson	593	304
Joseph L. La Driere	602	308
Ed. Steiner (recalled)	653	333
Eugene W. Baltes	654	334
Caeser Grande	673	344
E. Fournelle	718	367
Jacob A. Weinman	730	373
James N. Gladding	753	385
William Culloden	774	397
Defendants rest	804	410
Rebuttal	805	411
Testimony of Bernard Ruppe	805	411
Pitt Ross	814	415
Plaintiffs rest	820	418
No sur-rebuttal	820	418
Motion to strike out renewed and overruled	820	418
Motion to strike out	821	418
Motion for verdict for defendants	825	420
Instructions to jury	826	421
Requests of Barnett for instructions	842	429
Requests of Weinman for instructions	851	434
Verdict	862	439
Special verdict	864	440
Further instructions to the jury	868	443
Verdict	870	444
Motion of Barnett for new trial	871	444
Motion of Weinman for new trial	879	450
Ruling as to exhibits	889	456
Ruling as to exhibits	890	457
Judge's certificate to bill of exceptions	890	457
Clerk's certificate to transcript of record	891	457

	Original.	Print
Assignment of errors by Barnett	893	458
Assignment of errors by Weinman	931	478
Order extending time for filing motion for diminution of record.	948	488
Suggestion of diminution, &c	948	488
Order granting writ of certiorari	949	489
Writ of certiorari and return	950	491
Order to send up original bill of particulars	952	491
Affidavit of clerk of district court	952	491
Writ of certiorari and return	954	493
Order taking cause under advisement	955	494
Judgment	955	494
Order granting time to file petition for rehearing	956	494
Motion for rehearing	957	495
Order denying rehearing, &c	958	496
Remittitur of part of judgment	959	496
Judgment on remittitur	960	497
Supersedeas bond	961	498
Order to send up original exhibits	963	499
Assignment of errors	965	500
Syllabus	994	526
Opinion	997	528
Clerk's certificate to record	1009	536

a UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable Judges of the Supreme Court of the Territory of New Mexico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, before you, wherein Jacob Weinman and Joseph Barnett, were appellants and Ivan Grunsfeld and M. W. Flournoy, their sureties on the supersedeas Bond to supersede the said Judgement, and Richard Di Palma and Bernard Ruppe, were appellees, a manifest error hath happened, to the great damage of said Appellants, and their sureties on the Supersedeas Bond, as by their complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within sixty days from the date hereof; in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause, further to be done therein, to correct that error, what of right, and according to the law and custom of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, and the seal of the Supreme Court of the Territory of New Mexico, this the 18th day of December, A. D., 1911.

[Seal Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,
Clerk Supreme Court of New Mexico.

b THE UNITED STATES OF AMERICA:

To Richard de Palma and Bernard Ruppe, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at Washington within sixty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, wherein Jacob Weinman and Joseph Barnett were appellants, and you were appellees, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as the said writ of error mentioned, should not be corrected, and why speedy justice should not be done in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, and the seal of the Supreme

Court of the Territory of New Mexico this the 18th day of December, A. D. 1911.

[Seal Supreme Court, Territory of New Mexico.]

WILLIAM H. POPE,
Chief Justice, etc.

Personal service of the foregoing writ is admitted this 19th day of December 1911.

MARRON & WOOD,
Attorneys for Richard de Palma and Bernard Ruppe, Defendants in Error.

6 TERRITORY OF NEW MEXICO,
Supreme Court, ss:

I, Jose D. Sena, Clerk of the Supreme Court of the Territory of New Mexico, do hereby make return to the within writ of error, by transmitting to the Supreme Court of the United States, a true copy of the record and proceedings in the said cause therein mentioned, under my hand and the seal of the Supreme Court of the Territory of New Mexico,

I further certify that I return herewith the original citation in the above entitled cause, duly served with acknowledgement of service thereon

Witness my hand and the seal of the Supreme Court of the Territory of New Mexico, this the 9th day of January A. D. 1912

[Seal Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,
Clerk Supreme Court of New Mexico.

1 Be it remembered that heretofore, on to-wit on the 12th day of November, A. D., 1911, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a transcript of record in a certain cause therein entitled, Richard di Palma and Bernard Ruppe vs. Jacob Weinman and Josepg Barnett, and numbered 1359, which said transcript was and is in the following words and figures following towit:

2 In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1910.

No. 1359.

RICHARD DI PALMA and BERNARD RUPPE, Appellees,

vs.

J. A. WEINMAN and JOSEPH BARNETT, Appellants.

Appeal from the District Court, Bernalillo County.

Transcript of Record.

Be it remembered, that heretofore, on to-wit, the 26th day of August, 1902, there was filed in the office of the Clerk of the District

Court of the Second Judicial District, Territory of New Mexico, within and for the County of Bernalillo, a Complaint in a certain cause wherein Richard Di Palma and Bernard Ruppe were plaintiffs, and Jacob Weinman and Joseph Barnett were defendants; which said Complaint is in the words and figures following, to-wit:

3 In the District Court of the County of Bernalillo, Territory of New Mexico.

RICHARD DI PALMA and BERNARD RUPPE, Plaintiffs,
vs.
JACOB WEINMAN and JOSEPH BARNETT, Defendants.

Complaint.

The plaintiffs complain of the said defendants and allege:

1. That on the 9th day of November, 1901, the defendant, Jacob Weinman, was seized in fee of the following real estate situate in the county and territory aforesaid, to-wit:

Lot two of Block sixteen of the Original Townsite of Albuquerque as the same is known and designated on the plat thereof filed in the office of the Probate Court and Ex-officio Recorder of said county on the — day of —— 188—.

2. That the said defendant, Jacob Weinman, on the day and year last above mentioned executed and delivered to the plaintiffs his certain lease of that date (a copy of which is filed herewith and made a part heréof, marked Exhibit A) and thereby then and there demised and leased to said plaintiffs the above described premises to have and to hold from the 15th day of December, 1901, for and during and until the 15th day of December, 1903, which said lease was made in consideration of the sum of Ten Hundred and Eighty Dollars to be paid by said plaintiffs in monthly installments
4 of ninety dollars each in advance on the first day of each and every month during the term of said lease.

3. Plaintiffs further allege that at the time of making of said lease and up to the time of the injury hereinafter set out there was upon the above described premises a substantial store building and on or about the said 15th day of December, 1901, the said defendant, Weinman, in pursuance of said lease, placed said plaintiffs in possession of said premises which said possession was retained by said plaintiffs from that time up to the injury hereafter set out and they occupied and used said building in their business of prescription and retail druggists together with their stock of drugs, patent medicines and other merchandise, furniture fixtures, soda water fountain, tonophone, and other personal property.

4. Plaintiffs further allege that afterwards on or about the 30th day of June, 1902, the said defendants, well knowing the facts above set forth, and contriving to injure and destroy the property of the plaintiffs, unlawfully entered upon said premises and with force and arms tore down and destroyed a large portion of the walls and roof of said store building so that the same fell upon, injured, broke and

destroyed said tonophone, soda fountain, furniture, fixtures, drugs, patent medicines and other merchandise and personal property of great value, to-wit, of the value of Three Thousand Dollars, and so injured, wrecked and destroyed said building as to make it wholly unfit for plaintiffs' business; and since the date *the* last mentioned above, the said defendants have continued to occupy said premises and have wholly destroyed and torn down the rest of said building.

Plaintiffs further allege that said leasehold was of great value, to-wit, of the value of more than One Thousand Dollars over and above the rent stipulated in said lease which has been wholly lost by reason of the wrongs above complained of and said plaintiffs were compelled to remove to a less favorable location at great expense, to-wit, the sum of Five Hundred Dollars.

Plaintiffs further allege that the business of said plaintiffs on the above described premises was very profitable and worth to the plaintiffs more than Fifteen Dollars per day over and above the expenses thereof and which the plaintiffs could have continued to make on said premises during the whole of said term but for the wrongs of the defendants above complained of and which the plaintiffs have wholly lost by reason of the wrongs above complained of to their damage in the sum of Five Thousand Five Hundred Dollars.

Wherefore, plaintiffs pray judgment against said defendants in the sum of Ten Thousand Dollars with interest and costs of suit.

O. N. MARRON,
McMILLEN & RAYNOLDS,
Attorneys for Plaintiffs.

TERRITORY OF NEW MEXICO,
County of Bernalillo, ss:

Bernard Ruppe, being by me first duly sworn, says that he is one of the above named plaintiffs; that he has read the foregoing complaint and that the same is true of his knowledge except as to matters stated on information and belief and as to those he believes them to be true.

BERNARD RUPPE.

Subscribed and sworn to before me this 7th day of August, 1902.
[NOTARIAL SEAL.]
O. N. MARRON,
Notary Public.

Endorsed: Filed in my office this Aug. 26, 1902, W. E. Dame, Clerk.

And Thereafter, on to-wit, the 5th day of September, A. D. 1902, there was filed in the office of the Clerk of said Court, in said cause, a Separate Answer of the Defendant, Joseph Barnett, which said Answer is in words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO:

Bernalillo District Court.

No. 6173.

RICHARD DI PALMA, et al., Plaintiff,
vs.
JACOB WEINMAN and JOSEPH BARNETT, Defendants.

Separate Answer of the Defendant Joseph Barnett.

The defendant Joseph Barnett by way of separate answer to the complaint of the plaintiffs says:

I.

That he is an entire stranger to all the matters and things
7 set forth and alleged in paragraphs one, two and three of the said complaint and has no knowledge or information sufficient to form a belief as to the truth of several allegations and he therefore denies the same and demands strict proof thereof.

II.

Further answering this defendant denies that on or about the 30th day of June, 1902, he, this defendant, well knowing the facts set forth in paragraphs one, two and three of the said complaint or contriving to injure or destroy the property of the plaintiffs unlawfully entered upon the premises mentioned in said complaint or with force and arms or otherwise tore down or destroyed a large portion or any portion of the walls and roof of said store building; but this defendant admits that a portion of the roof and wall of said store building fell; but this defendant is informed and believes that the said wall fell because of its defective construction and because the same was old and out of repair and had fallen into decay and not by reason of any act done by this defendant; and this defendant alleges that the said roof fell because it was deprived of the support of said wall occasioned as herein alleged and not otherwise; and this defendant has no knowledge or information sufficient to form belief as to the character of merchandise or val-e thereof which was injured by the fall of said wall and roof; but this defendant denies that the same was at the value of three thousand dollars or was of any greater value than the sum of six hundred dollars.

8 III.

Defendant has no knowledge or information sufficient to form a belief as to the value of the lease hold as alleged in the said complaint but this defendant denies that the same was of the value of more than one thousand dollars over and above the rent stipulated in said lease or the same was of any value whatever or the same has been wholly or otherwise lost by reason of any act of this defendant

and this defendant says that he is informed and believes and therefore charges that the plaintiffs voluntarily surrendered the premises mentioned in the complaint to his co-defendant Jacob Weinman whereby the estate of the said plaintiffs in the said premises became and was terminated and extinguished.

IV.

Further answering the defendant says that he has no knowledge or information sufficient to form a belief as to whether or not the business of the plaintiff was profitable or otherwise and he is advised by counsel and believes and therefore charges that the value of the said plaintiff's business is wholly immaterial in this cause; but this defendant says that if the value of the plaintiff's business as alleged in complaint is material in this cause then this defendant denies that the same was of any value whatever.

V.

Further answering this defendant — that after the fall of the wall and roof of the said building as hereinbefore set forth whereby the said building became and was rendered uninhabitable the
9 plaintiffs voluntarily removed their stock of merchandise into another store and building selected, as this defendant is informed and believes by themselves and surrendered to his co-defendant, Jacob Weinman the possession of the premises described in the complaint and thereafter the said Jacob Weinman entered into negotiations with this defendant for the sale to this defendant of the premises aforesaid and for the settlement of all claims which, he the said Jacob Weinman, as owner of the said building might have or claim to have against this defendant by reason of the falling of said wall and roof of said building; and during the progress of the said negotiations the said Jacob Weinman with a knowledge of the said plaintiffs represented to this defendant that he the said Jacob Weinman had settled with Bernard Ruppe one of the plaintiffs in this cause for the damages occasioned to the stock of merchandise of the plaintiffs by the falling of the said wall and roof and thereupon this defendant relying upon the truth of the said representation of his said co-defendant Jacob Weinman so made with a knowledge and acquiescence of the plaintiff Bernard Ruppe, this defendant then and there agreed with the said Jacob Weinman to pay to him the sum of ten thousand five hundred dollars for the said premises and for all damages which he the said Jacob Weinman had incurred or which had accrued to him the said Jacob Weinman by reason or in consequence of the fall of the building aforesaid and this defendant then and there paid to the said Jacob Weinman the sum of
10 two hundred and fifty dollars and twenty-three cents on account of said agreement; and thereafter and on the 26th day of July, 1902, this defendant paid to the said Jacob Weinman the balance of the said sum of ten thousand five hundred dollars so agreed to be paid as aforesaid and received from the said Jacob Weinman a deed of conveyance of the said premises and a release

of all claims of all damages and his said co-defendant Jacob Weinman then and there delivered to this defendant the premises aforesaid which said premises were unoccupied and in an uninhabitable condition; and this defendant is advised by counsel and believes and therefore charges that by reason of the premises the said plaintiffs are estopped to claim any estate or interest in the premises aforesaid or any damages accruing or alleged to have accrued subsequent to the payment by this defendant to his co-defendant Jacob Weinman of the said sum of two hundred and fifty dollars and twenty-three cents as hereinbefore alleged.

Defendant filed herewith copies of the said deed of conveyance and release which are marked respectively "Exhibit- A and B" and are prayed to be taken and considered as part of this answer.

Having fully answered this defendant prays to be hence dismissed *which* his cost in this behalf most wrongfully sustained.

NEILL B. FIELD,
Attorney for Defendant Joseph Barnett.

TERRITORY OF NEW MEXICO,
County of Bernalillo:

11 Joseph Barnett being first duly sworn upon his oath deposes and says that he has heard read the aforegoing answer and knows the contents thereof *of* the allegations therein contained are true of his own knowledge except as to such parts thereof as are made upon information and belief and as to said parts he believes the same to be true.

JOSEPH BARNETT.

Subscribed and sworn to before me by Joseph Barnett, this 2nd day of September, 1902.

[NOTARIAL SEAL.]

A. E. PEREA,
Notary Public.

This Indenture made this 25th day of July, in the year of our Lord One Thousand Nine Hundred and two between Jacob A. Weinman and Clara Weinman, his wife, residents of the city of Albuquerque, County of Bernalillo, New Mexico, parties of the first part, and Joseph Barnett, also a resident of the said city of Albuquerque, County of Bernalillo, Territory of New Mexico, party of the second part.

Witnesseth, That the said parties of the first part, for and in consideration of the sum of ten thousand five hundred ($10,500) dollars lawful money of the United States, to them in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, have granted, bargained, sold, remised, conveyed, released and confirmed, and by these presents do grant, bargain, sell, remise, convey, release and confirm unto the said party of the second part, his heirs and assigns, forever, all the fol-

12 lowing described lot or parcel of land and real estate, situate, lying and being in the County of Bernalillo and Territory

of New Mexico to-wit: Lot number two (2) in Block No. 16 (Sixteen) of the New Mexico Town Co. Addition to the Town (now city) of Albuquerque, N. M., as said lot and block are known, designated and described upon the map and plat of said addition, made by John A. Fulton, C. E., and filed for record in the office of the Probate Clerk and Ex-officio Recorder of the County of Bernalillo, New Mexico, on the 5th day of May, A. D. 1880.

Together with all and singular the hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the revision and revisions, remainder and remainders, rents, issues and profits thereof; and all the estate, right, title, interest, claim and demand whatever of the said parties of the first part, either in law or equity, of, in and to the above bargained premises, with the hereditaments and appurtenances:

To Have and To Hold the said premises above bargained and described with the appurtenances, unto the party of the second part, his heir- and assigns forever. And the said parties of the first part, for their heirs, executors and administrators, do covenant and agree, to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these presents they are well seized of the premises above conveyed, of a good, sure, perfect and indefeasible estate of inheritance, in law and in fee simple,
and have good right, full power and lawful authority to grant,
13 bargain, sell and convey the same in *matter* and form aforesaid; and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments and incumbrances of what kind and nature soever; and the above bargained premises, in the quiet and peaceful possession of the party of the second part his heirs and assigns, against all and every person lawfully claiming or to claim the whole or any part thereof, the said parties of the first part shall and will warrant and forever defend.

In Witness Whereof, the said parties of the first part have hereunto set their hand- and seal- the day and year first above written.

JACOB WEINMAN. [SEAL.]
CLARA WEINMAN. [SEAL.]

Signed, sealed and delivered in the presence of

——— ———.

TERRITORY OF NEW MEXICO,
County of Bernalillo:

On this 25th day of July, 1902, before me personally appeared Jacob A. Weinman and Clara Weinman, his wife, to me known to be the person- described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed.

My commission expires —.

Witness my hand and seal the day and year last above written.

OTTO DIECKMAN,
Notary Public.

For and in consideration of the sum of one dollar to me in hand paid by Joseph Barnett and for other good and valuable con-
14 siderations received by me from said Joseph Barnett, the receipt whereof is hereby confessed and acknowledged, I do forever acquit and release the said Joseph Barnett from any and all claims for loss or damage accruing to me by reason or in consequence of the falling of the building on lot number two in block number 1 of the city of Albuquerque and I do hereby covenant and agree to and with the said Joseph Barnett for the consideration aforesaid that I will not on any pretense whatever bring, prosecute or maintain any suit, action or demand against the said Joseph Barnett for any cause whatever growing out of the falling of said building or any part thereof or of any damages or injury accruing to me on account thereof but I do hereby affirm and declare that all such damages have been by the said Joseph Barnett fully satisfied and discharged.

Witness my hand and seal this 23d day of July, A. D. 1902.

JACOB WEINMAN. [SEAL.]

TERRITORY OF NEW MEXICO,
County of Bernalillo:

Be it remembered that on this 26th day of July, A. D. 1902, personally appeared before the undersigned a Notary Public within and for the County and Territory aforesaid Jacob Weinman to me well and personally known to be the person named in and who has executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

In Witness Whereof, I have hereunto set my hand and
15 seal the day and year last above written.

M. E. HICKEY,
Notary Public, Bernalillo Co.

Endorsed: Filed in my office this Sept. 5, 1902. W. E. Dame, Clerk.

And Thereafter, on to-wit, the 16th day of September, A. D. 1902, there was filed in the office of the clerk of said Court, in said cause, a Separate Answer of Defendant Weinman, which said Answer is in words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO,
County of Bernalillo:

In the District Court.

No. 6173.

RICHARD DI PALMA and BERNARD RUPPE, Plaintiffs,
vs.
JACOB WEINMAN and JOS. BARNETT, Defendants.

Answer.

Now comes Jacob Weinman, one of the defendants, in the above entitled cause, by W. B. Childers his attorney, and files this his separate answer to the complaint of the plaintiffs, and for answer to the same, says:

1. That he admits the allegations in paragraphs one and two of the said complaint contained.

2. As to the allegations in paragraph three, said defendant denies that at the time of the making of said lease, and up to the time of the injury in said complaint therein set up, there was upon the above described premises a substantial store building, but
16 alleges that the building upon said premises was a one-story adobe, the foundation of which did not extend but a few inches below the surface of the ground, and the wall of the same was, at the time of the making of said lease, out of plumb, and defendant further alleges, that the said plaintiff accepted the said building and premises as being in good order and condition, and further covenanted that at the expiration of the said lease and the time mentioned therein, he would yield up the same to the defendant, the lessor, in as good order and condition as when the same were entered upon by him, and that he would keep the said premises in good repair during the term of said lease.

3. This defendant further answering, admits that the plaintiffs thereafter entered into possession of said premises and used the same as in said paragraph three alleged.

4. As to the allegations in paragraph four of said complaint, this defendant denies that on the thirtieth day of June, 1902, that he unlawfully or otherwise entered upon the said premises, and with force and arms tore down and destroyed a large portion of the walls and roof of the said store building, or any portion thereof, so that the same fell upon, injured, broke and destroyed the property of the said plaintiffs, as in said paragraph alleged, so as to make the same unfit for plaintiffs' business, as therein alleged. Defendant further answering said paragraph four, of said complaint, denies that he entered in and upon the said premises during the pendency
17 of said lease, or at any other time, and denies that he has continued to occupy the same, or destroyed or tore down the rest of said building, as in said paragraph alleged. This defendant denies that the said leasehold was of great value, to-wit, of a value of

more than one thousand dollars over and above the rent stipulated to be paid in said lease, as in said complaint alleged.

5. This defendant further answering, denies that the business of the said plaintiffs carried on in the said above described premises was worth to the plaintiff more than fifteen dollars per day over and above the expenses thereof, or that the plaintiff could have made that amount of money during the period of said lease, or that he suffered damages in the sum of five thousand five hundred dollars, as in said complaint alleged, or any other sum.

6. Further answering, this defendant alleges, that the said plaintiff forfeited all his rights under the said lease, and terminated the same on or about the 1st day of July, A. D. 1902, by the failure and refusal to pay the rent reserved by the terms of said lease, that is to say, the sum of ninety dollars per month for the month of July, due and payable on the first day of July, 1902; which said sum this defendant avers, he demanded payment of the said plaintiff and said plaintiff then and there refused and still refuses to pay the same or any part of the rent reserved under the terms of the said lease; and that by reason of such refusal, the plaintiffs' right to have possession, and the use and enjoyment of said premises, terminated on
18 the thirtieth day of June, 1902.

Wherefore, by reason of the matters and things set forth in this his answer, this defendant prays to be hence dismissed with his costs.

W. B. CHILDERS,
Attorney for Defendant Jacob A. Weinman.

TERRITORY OF NEW MEXICO,
County of Bernalillo, ss:

Jacob A. Weinman, of lawful age, being duly sworn, upon oath deposes and says: That he is one of the defendants in the above entitled cause; that he has heard read the foregoing answer, and knows the contents thereof, and that the matters and things therein set forth are true, except such as are therein stated to be upon information and belief, and as to those he believes them to be true.

JACOB A. WEINMAN.

Subscribed and sworn to before me this the 16th day of September, A. D. 1902.

[NOTARIAL SEAL.] E. L. MEDLER,
Notary Public.

Endorsed: Filed in my office this Sep. 16, 1902. W. E. Dame, Clerk.

And thereafter, on to-wit, the 24th day of September, A. D. 1902, there was filed in the office of the clerk of said Court, in said cause, Plaintiffs' Answer to New Matter in Answer of Barnett, which said Answer is in words and figures as follows, to-wit:

In the District Court of the Second Judicial District of the Territory of New Mexico Within and for the County of Bernalillo.

19 RICHARD DI PALMA et al., Plaintiffs,
vs.
JACOB WEINMAN et al., Defendants.

Answer of the Plaintiffs to the New Matter Contained in the Answer of the Defendant Joseph Barnett.

These plaintiffs answering to the new matter contained in Paragraph 5 of the answer of the said defendant Joseph Barnett, state that they have no knowledge whatever regarding the negotiations between the said defendants for the sale to the defendant Barnett of the premises mentioned in said complaint and for the settlement of the claims which said Weinman had against said Barnett; that these Defendants deny that during the progress of the said negotiations the said Weinman with the full knowledge of these plaintiffs represented to the defendant Barnett that he, the said Weinman had settled with the said plaintiff Bernard Ruppe and these Defendants deny that the said Jacob Weinman with the full knowledge of the said plaintiff Bernard Ruppe, or any knowledge whatever on the part of the said Bernard Ruppe, agreed with the said Barnett for the sale by the said Weinman and the purchase by the said Barnett of said premises described in said complaint, and these Defendants say that they are perfect strangers to all matters alleged in Paragraph 5 of said answer and have no knowledge of the same, and plaintiff denies each and every other allegation in said answer
20 contained.

McMILLEN & RAYNOLDS,
O. N. MARRON,
Attorneys for Plaintiffs.

TERRITORY OF NEW MEXICO,
County of Bernalillo, ss:

Bernard Ruppe, being first duly sworn, upon his oath deposes and says that he is one of the plaintiffs in said cause, that — has read the foregoing answer to the new matter contained in the answer of said defendant, Joseph Barnett and knows the contents thereof and that the same are true.

B. RUPPE.

Subscribed and sworn to before me this 24th day of September, A. D. 1902.

[NOTARIAL SEAL.] O. N. MARRON,
Notary Public.

Subscribed and sworn to before me this 23rd day of October, 1902.

Endorsed: Filed in my office this Sep. 24, 1902, W. E. Dame, Clerk.

And thereafter, on to-wit, the 17th day of October, A. D. 1902, there was filed in the office of the Clerk of said Court, in said cause, a Motion for Bill of Particulars, which said Motion is in words and figures as follows, to-wit:

Territory of New Mexico, Bernalillo District Court.

21 RICHARD DE PALMA et al, Plaintiffs,
vs.
JACOB WEINMAN et al., Defendants.

Motion for Bill of Particulars.

Comes now the defandant, Joseph Barnett, by Neill B. Field, his attorney, and moves the Court to require the plaintiffs to furnish a bill of particulars in the above entitled cause and to set forth in said bill of particulars and show

I.

A full description of the tonophone and soda fountain alleged in the complaint to have been destroyed together with the value of the same as claimed by the plaintiffs.

II.

A list and full description of furniture and fixtures alleged in the complaint to have been destroyed with the value of each article thereof as claimed by the plaintiffs.

III.

A list of the drugs, patent medicines and other merchandise and personal property alleged in the complaint to have been destroyed with full description of the same and the value of each article thereof as alleged by the plaintiffs.

For cause of said motion the said defendant says that a knowledge of the matters called for in this motion is essential to the proper preparation of his defense in this case.

NEILL B. FIELD,
Attorney for Defendant Joseph Barnett.

22 To Messrs. McMillen & Raynolds and O. N. Marron.

GENTLEMEN: You are hereby notified that on Thursday, the 16th day of October, 1902, about the hour of nine o'clock a. m. or as soon thereafter as counsel can be heard, application will be made in the court aforesaid for an order awarding the bill of particulars in the above entitled cause in accordance with the foregoing motion and you can appear and resist the said motion if you see fit to do so.

NEILL B. FIELD,
Attorney for Joseph Barnett.

Endorsed: Filed in my office this Oct. 17, 1902. W. E. Dame, Clerk.

And thereafter, on to-wit, the 20th day of October, A. D. 1902, there was entered of record in the office of the Clerk of said Court, in said cause, an Order, which said Order is in words and figures as follows, to-wit:

No. 6173.

R. DI PALMA et al.
vs.
J. A. WEINMAN et al.

This cause is this day heard on defendants' motion to require the plaintiffs to furnish bill of particulars, and after hearing the arguments of counsel for the respective parties and being fully advised in the premises, it is considered and ordered by the Court that said motion be and the same is hereby granted, and that plaintiffs
23 be and are hereby ordered to furnish and file said bill of particulars on or before the 21st day of October, 1902.

And Thereafter, on to-wit, the 20th day of October, 1902, there was filed in the office of the Clerk of said Court, in said cause, Plaintiffs' Bill of Particulars, which said Bill of Particulars is in words and figures following, to-wit:

Inventory Stock Lost in Wreck, June 30th, 1902.

3-4	doz.	Prickley Ash Bitters	$6.00
7-12	doz.	Malt Nutrine	1.26
7-12	doz.	Overholt Whiskey	7.00
1-6	doz.	Piperazine Water	3.00
1	doz.	California Claret	3.50
1-2	doz.	White Wine	1.75
3-4	doz.	Brandy, small	4.50
2	doz.	Coyote Water	2.00
11-12	doz.	Hunyadi Water	3.08
1-2	doz.	Malt Whiskey	1.00
1-12	doz.	Hostetter's Bitters	1.25
1	doz.	Envelopes	1.40
		Note Paper	.50
1	doz.	Papetries	3.00
1	lb.	White Rose Extract	4.50
1-2	lb.	Heliotrope	2.25
2 3-4	lb.	Red Rose	16.50
1-12	doz.	J. M. Farina	.90
1 1-2	lb.	Crush Rose	9.00
1-5	doz.	Frazier's Bitters	1.30

24

1-4	doz.	Electric Bitters	2.00
2 1-2	lb.	Sachet Powder	10.00

12	lbs.	Assorted Extracts @ $3.75	45.00
		Yale's Goods, destroyed and damaged	15.00
1-3	doz.	Florida Water	1.85
2-3	doz.	Toilet Water	4.96
1-4	doz.	Imperial Crown Toilet Water	1.00
1-4	doz.	Eastman's Florida Water	1.00
3-4	doz.	Meyer Bros. Florida Water	3.00
3		Looking Glasses	7.50
2		Looking Glasses, @ $2.00	4.00
3		Looking Glasses @ $1.50	4.50
1-6	doz.	Pino's Hair Tonic	1.30
1-4	doz.	Pino's Hair Tonic, small	1.00
1-2	doz.	Lemon Balm	.75
1-2	doz.	Damchusky Hair Dye	2.00
1-4	doz.	Damchusky Hair Dye	1.00
1	doz.	German Cologne	3.00
1-2	doz.	Florida Water, M. B.	2.00
1-4	doz.	Ayer's Sarsaparilla	2.00
1-4	doz.	Hood's Sarsaparilla	2.00
1-4	doz.	Spring Medicine	1.50
7-12	doz.	Manhattan	3.50
1-12	doz.	Cuticura Resolvent	.85
1-6	doz.	Warner's Safe Cure	1.50
1-4	doz.	Warner's Liver & Kidney	2.00
1-12	doz.	Eskay's Food	.50
1-4	doz.	Malted Milk	1.20
1-6	doz.	Malted Milk, large	1.80
		Perfumes from show cases, 25c., 50c. and 75c.	33.00
25			
1		Only Cut Glass bottle	5.00
6		Toilet Cases	24.50
4		Handkerchief Boxes	7.00
3	doz.	Perfumery, small	6.00
1		Toilet Case	7.00
2		Men's Toilet Cases	14.00
3		Collar & Cuff boxes	3.70
2		Shaving Sets	4.00
2		Shaving Sets	3.25
6	lb.	Bulk Perfume @ $5.00	30.00
4	lb.	Bulk Perfume @ $3.75	15.00
1-4	doz.	San Matto	2.00
1-2	doz.	Creme de Camille	1.50
1-2	doz.	Trommer's Extract of Malt	4.00
1-2	doz.	White Pine & Tar	2.00
1-4	doz.	St. Jacob's Oil	1.18
1	doz.	Rubber Adhesive Plasters	4.00
1-4	doz.	Espey's Cream	.50
5-12	doz.	Herpicide	3.15
1-4	doz.	Egg Food	.54
1-2	doz.	Kentucky condition powders	.75

1-4 doz.	Capo Oil	1.70
1-4 doz.	Hirsutas	2.18
1-12 doz.	Carboline	.63
1-6 doz.	Dandruff Cure	1.30
1-12 doz.	Petro-carbol	.35
1-4 doz.	Amole Shampoo	.50
1-6 doz.	Tar Shampoo	.35
1-2 doz.	Hooper's Cough Syrup	.75
1-2 doz.	Egg Shampoo	1.00
1-4 doz.	Piso's Cure for consumption	.50
1-2 doz.	Grobe's Chill Tonic	2.00
1-2 doz.	Bell's Pine Tar & Honey	1.00

26

1-4 doz.	Bovenine	1.12
1-6 doz.	Ayer's Cherry Pectoral	.67
1-2 doz.	Winslow's Soothing Syrup	.50
1-4 doz.	Winchell's Teething Syrup	.50
1-2 doz.	Vaseline Camphor Ice	.40
1-4 doz.	Vaseline Camphor Ice, tubes	.18
1-4 doz.	Peruna	2.00
1-4 doz.	Perfume @ $2.50	7.50
1-2 doz.	Grape Juice	1.50
1-2 doz.	Nerve Tonic	.67
5-12 doz.	Strengthening Cordial	1.75
1-6 doz.	Miles Nervine	1.30
1-4 doz.	Heart Cure	2.00
1-4 doz.	Tonic	2.00
1-2 doz.	Maltine	4.00
1-6 doz.	Paine's Celery Compound	1.35
1-4 doz.	Green's Nervura	2.00
1-2 doz.	Mother's Friend	4.00
1-2 doz.	Kodal Dyspepsia Cure	2.00
7-12 doz.	Herbine	2.45
1-6 doz.	Sanford's Liver Regulator	1.30
1-6 doz.	Fellow's Hypophosphites	2.00
1-12 doz.	Hagee's Cod Liver Oil	.75
1-12 doz.	Periline	.75
1-4 doz.	Cod Liver Oil Emulsion	2.00
1-6 doz.	Ozo Emulsion	1.35
1-4 doz.	Hosford's Acid Phosphate	1.00
1-4 doz.	Papoid Tablets	1.00
1-6 doz.	Stewart's Tablets	1.30
1-4 doz.	Catarrh Tablets	.70
1-4 doz.	Swamp Root	2.00
1-4 doz.	Swamp Root, small	1.00
1-2 doz.	Wine of Cardui	4.00

27

1-4 doz.	Wine of Cod Liver Oil	2.00
1-4 doz.	Thialion	2.50

1-6	doz.	Shoop's Restorative	1.35
1-4	doz.	Pond's Extract	1.00
1-2	doz.	Chamberlain's C. C. Remedy	1.00
1-4	doz.	Chlorides (Platt's)	1.00
1-2	doz.	Chamberlain's C. C. Remedy, large	2.00
1	doz.	Gauze Bandages	1.20
1-2	doz.	Gauze Bandages, 2-inch	1.00
		Damage to Suspensories	15.00
1-2	doz.	Cod Liver Oil	1.75
1-6	doz.	Eno's Salts	1.40
1-4	doz.	Bromo-Sulzer	2.00
1-6	doz.	Wizard Oil	1.35
1-4	doz.	Wizard Oil, small	1.00
1-4	doz.	Pierce's Smart Weed	.50
1-6	doz.	Vapo-Cresoline	.70
		Cigars destroyed	57.90
		Cigarettes destroyed	40.83
1-2	doz.	Nail Polishers	.75
1-2	doz.	Nail Polishers, large	2.00
1		Toilet Nail Set	1.00
1		Toilet Nail Set	.90
1		Baby Set	1.35
5	doz.	Hair Brushes	17.75
6	doz.	Tooth Brushes	7.50
3	doz.	Cloth Brushes	13.25
6	doz.	8 oz. Extracts	4.00
1-6	doz.	Cut Glass	5.00
1-2	doz.	Square	6.00
1-12	doz.	Gin	1.25
1 1-2	doz.	Nail Brushes	4.50

28

1	doz.	Shoe Brushes	1.50
1-4	doz.	Toilet Boxes	2.00
1-6	doz.	Small Dusters	1.50
1-2	doz.	Picture Frames	1.00
1-2	doz.	Picture Frames, medium	1.50
1-6	doz.	Nail Polishers	1.00
1-2	doz.	Rubifoam	1.00
1	doz.	Tooth Powder	2.00
1-2	doz.	Tooth Soap	.87
1-2	doz.	Tooth Soap	.63
1-4	doz.	Orodentine	.37½
		Total	$657.87½

Inventory Fixtures Lost in Wreck, June 30, 1902.

Electric Piano	$600.00
Extra Roller	40.00
Freight	28.50

Hauling	2.50
Electric Wiring	3.50
Three Floor Show Cases	150.00
1 Cigar Case	74.00
1 Cigarette Case	10.00
1 Marble Slab	30.60
1 Looking Glass	15.00
Shelving and Brackets for same	1.50
1 Regulator Clock	7.50
½ doz. Soda Water Holders	1.50
7 Soda Water Holders, large	2.80
9 Spoons	1.50
2 Essence Bottles	1.50
1 Chocolate Pitcher	1.75
6 gal. Syrups	9.00

29

2 gallons of Ice Cream	2.50
Crush Fruit and Bowls	2.00
4 Bowls	6.00
1 Lemon Knife	.75
4 Chairs, $1.65 a piece	6.60
Damage to Elk Painting	25.00
Frame for same	10.00
Back Shelving, Closets and Perfumery Case	225.00
2 Front Glass for show case, replaced	6.00
1 Top Plate Glass replaced	15.00
2 Terra Cotta Busts	2.00
2 Window Show Globes	9.00
Window Curtain Poles and Carpet	20.30
Gas Fixtures, Drops, Cigar Lighter	29.20
Plumbing	94.00
Carpenter's Labor, repairing fixtures, moving, etc.	46.00
Hauling, drayage, Trimble's Bill	19.50
Extra help in loading night of 30th	6.00
Helping in searching rooms, moving, etc. from second day	16.75
Brooks, Miscellaneous loads	3.50
Office Chair	1.50
Ladies' Desk	6.50
Glass in sponge case as per Hudson's bill, replaced	2.00
Doors in show case, replaced	2.50
Looking Glass for same	3.00
Plumbing bill in new quarters	88.00
Shelves, wood bill, new quarters	8.36
Loss of Fixtures	$1,638.11

30 *Summary.*

Loss on stock	$657.87½
Freight, on drugs	65.78
Loss on Fixtures	1,638.11
Damage to stock by soiling by dust, spilt medicines, etc.	500.00
Total Loss	$2,861.76

Endorsed: Filed in my office this Oct. 20, 1902. W. E. Dame, Clerk.

And Thereafter, on to-wit, the 23rd day of October, A. D. 1902, there was filed and entered of record in the office of the Clerk of said Court, in said Cause, an Order, which said Order is in words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO,
County of Bernalillo:

In the District Court.

R. DI PALMA et al.
vs.
J. A. WEINMAN et al.

Order.

On application of the plaintiffs, they are given leave to file an amended reply to the answer of the defendant Joseph Barnett, and to plead as they may be advised as to the answer of the defendant J. A. Weinman.

Thereupon this cause is continued until the next regular term of this court at the cost of the plaintiff.

B. S. BAKER, *Judge.*

31 Endorsed: Filed in my office this October 23, 1902, W. E. Dame, Clerk.

And Thereafter, on to-wit, the 1st day of November, A. D. 1902, there was filed in the office of the Clerk of said Court, in said cause, a motion and demurrer to answer of Barnett, which said Motion and Demurrer to Answer of Barnett is in words and figures as follows, to-wit:

In the District Court of the County of Bernalillo, Territory of New Mexico.

No. 6173.

RICHARD DI PALMA et al., Plaintiffs,
vs.
JACOB WEINMAN et al., Defendants.

Motion to Strike Out Parts of Answer of Joseph Barnett.

The plaintiffs move to strike out the words "but this defendant is informed and believes that the said wall fell because of its defective construction and because the same was old and out of repair and had fallen into decay and not by reason of any act done by this defendant; and this defendant alleges that the said roof fell because it was deprived of the support of said wall occasioned as herein alleged and not otherwise" found in paragraph two of said answer for the following reasons, to-wit:

1. Because all of said matter is irrelevant and redundant.

32 2. Because said matter, if relevant, is merely evidential and argumentative and contains no new matter within the meaning of the code.

3. Because said matter alleges no probative fact, which could be plead as new matter or otherwise.

And the said plaintiffs further move to strike out the following words "and this defendant says that he is informed and believes and therefore charges that the plaintiffs voluntarily surrendered the premises mentioned in the complaint to his co-defendant, Jacob Weinman, whereby the estate of the said plaintiffs in the said premises became and was terminated and extinguished" found in paragraph three of said answer for the following reasons, to-wit:

1. Because the same is irrelevant and redundant.

2. Because, if relevant, said matters are merely argumentative denials and not the allegation of new matter within the terms of section forty of the code of civil procedure.

And the plaintiffs demur to paragraph five of said answer and to each and every alleged defense therein set forth for the following reasons, to-wit:

1. Because neither of said alleged defenses state facts sufficient to constitute a defense.

2. Because said paragraph as a whole does not state facts sufficient to constitute a defense.

3. Because the allegations of the first pretended defense, being that portion of said paragraph found on page two of said answer, does not state any facts which, admitting the trespass, alleged,

33 constitutes a defense.

O. N. MARRON,
McMILLEN & RAYNOLDS,
Attorneys for Plaintiffs.

Endorsed: Filed in my office this Nov. 1, 1902. W. E. Dame, Clerk.

And Thereafter, on to-wit, the 1st day of November, A. D. 1902, there was filed and entered of record in the office of the Clerk of said Court, in said cause, an Order, which said Order is in words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO,
County of Bernalillo:

In the District Court.

No. 6173.

RICHARD DI PALMA et al.
vs.
J. A. WEINMAN et al.

Order.

This day this cause came on to be heard on the motion of the plaintiffs to strike out portions of the answer of the defendant Joseph Barnett, plain reply being withdrawn for that purpose and was argued by counsel and submitted to the Court.

Whereupon, the court being fully advised in the premises, finds that said motion is not well taken, and overrules the same, to which said ruling the plaintiffs except.

And this cause coming to be further heard on the demurrer of the plaintiffs to the 5th paragraph of the answer of the defendant, Joseph Barnett, the same was argued by counsel, and submitted to the court. Whereupon, the court being fully advised finds
34 that said demurrer ought to be overruled.

It is therefore ordered by the court that said demurrer be and the same hereby is overruled. To which said ruling of the court, plaintiffs except.

The said plaintiffs are allowed to file an amended reply within ten days from this date.

B. S. BAKER, *Judge.*

Endorsed: Filed in my office this Nov. 1, 1902. W. E. Dame, Clerk.

And Thereafter, on to-wit, the 1st day of November, A. D. 1902, there was filed in the office of the clerk of said court, in said cause, a Reply to Answer of Defendant Barnett, which said Reply to Answer of Defendant Barnett is in words and figures as follows, to-wit:

In the District Court of the County of Bernalille, Territory of New Mexico.

No. 6173.

RICHARD DI PALMA et al., Plaintiffs,
vs.
JACOB WEINMAN et al., Defendants.

Amended Reply to Answer of Joseph Barnett.

The plaintiffs, for reply to the answer of Joseph Barnett, one of the defendants herein,

1. Plaintiffs for reply to paragraph two of said answer deny that the wall of said building fell because of its defective construc-
35 tion and deny that the said wall fell because it was old and out of repair and had fallen into decay, and allege that said wall fell because of the trespass of the said defendants and not otherwise; and plaintiffs deny that said roof fell because it was deprived of the support of said wall occasioned as alleged in said answer and plaintiffs allege that said roof fell because of the trespass of said defendants who thereby caused said wall and roof to fall, being the same trespass alleged in said complaint.

2. For reply to paragraph three of said complaint, plaintiffs deny that they voluntarily surrendered the premises mentioned in the complaint to the defendant, Weinman, and allege that said plaintiffs were evicted by the wrongful act and trespass of said defendants complained of in said complaint.

3. For reply to the fifth paragraph of said answer, plaintiffs deny that they voluntarily moved their stock of merchandise into another store building selected by themselves, and deny that they surrendered to said defendant, Weinman, the possession of the premises described in said complaint and allege that the portion of the stock of merchandise not destroyed or lost as a consequence of the trespass of said defendants complained of in said complaint was removed by reason of the wrongful trespass and eviction hereinbefore set out; and the said plaintiffs deny all knowledge of the other allegations of said paragraph or information thereof sufficient to form a belief, except that said plaintiffs deny positively that they or either of them
36 had any knowledge of the alleged representations set forth in said paragraph five or that any of the alleged representations or acts of either of said defendants were done with their knowledge or acquiescence, and that they deny each and every allegation in said paragraph contained.

4. Said plaintiffs deny each and every other allegation in said answer contained not hereinbefore especially denied.

O. N. MARRON,
McMILLEN & RAYNOLDS,
Attorneys for Plaintiffs.

TERRITORY OF NEW MEXICO,
County of Bernalillo, ss:

Bernard Ruppe being by me first duly sworn, says that he is one of the plaintiffs, that he has read the foregoing reply and that the allegations therein contained are true of his knowledge except as to those matters stated to be on information and belief, and as to those matters he believes them to be true.

B. RUPPE.

Subscribed and sworn to before me this 1st day of November, A. D. 1902.

[NOTARIAL SEAL.] O. N. MARRON,
Notary Public.

Endorsed: Filed in my office this Nov. 1, 1902, W. E. Dame, Clerk.

And thereafter, on to-wit, the 1st day of April, A. D. 1903, there was filed in the office of the clerk of said court, in said cause, a Demurrer to Answer of Jacob Weinman, which said Demurrer
37 to Answer of Jacob Weinman, is in words and figures as follows, to-wit:

In the District Court of the County of Bernalillo, Territory of New Mexico.

No. 6178.

RICHARD DI PALMA et al., Plaintiffs,
vs.
JACOB WEINMAN et al., Defendants.

Demurrer to Answer of Jacob Weinman.

The plaintiffs demur to paragraph 2 of said answer for the reason that the same does not state facts sufficient to constitute a defense.

The plaintiffs further demur to paragraph 6 of said answer for the reason that the same does not state facts sufficient to constitute a defense.

O. N. MARRON,
McMILLEN & RAYNOLDS,
Attorneys for Plaintiffs.

Endorsed: Filed in my office this Apr. 1, 1903, W. E. Dame, Clerk.

And Thereafter, on to-wit, the 3rd day of April, A. D. 1903, there was filed in the office of the clerk of said court, in said cause, a reply of Plaintiffs to Answer of Weinman, which said Reply of Plaintiffs to Answer of Weinman, is in words and figures as follows, to-wit:

In the District Court of the County of Bernalillo, Territory of New Mexico.

38 No. 6173.

RICHARD DI PALMA and BERNARD RUPPE, Plaintiffs,
vs.
JACOB WEINMAN and JOSEPH BARNETT, Defendants.

Reply of Plaintiffs to the Answer of Jacob Weinman.

Come now the said plaintiffs and for reply to the answer of Jacob Weinman admit that the building upon said premises was a one-story adobe; and that the plaintiffs by the terms of said lease accepted the said building and premises as being in good order and condition; and the said plaintiffs admit that the said Weinman demanded payment from the said plaintiffs of the sum of ninety dollars for the month of July, 1902, and that the said plaintiffs refused to pay the same; and these plaintiffs allege that by reason of the trespass and wrongful acts of said Weinman, the said building was rendered wholly uninhabitable and unfit for use, and the said Weinman from the time of said trespass until on or about the 25th day of July, 1902, continued to occupy said premises, at which time, the said Weinman, as plaintiffs are informed and believe, executed and delivered to his said co-defendant, Barnett, a deed for said premises and thereby granted to his said co-defendant, Barnett, the premises described in said complaint and placed the said Barnett in possession thereof, who has since occupied said premises as owner thereof.

And the said plaintiffs deny each and every allegation of
39 said answer not herein specifically admitted.

O. N. MARRON,
McMILLEN & RAYNOLDS,
Attorneys for Plaintiffs.

TERRITORY OF NEW MEXICO,
County of Bernalillo, ss:

B. Ruppe, being by me first duly sworn, says that he is one of the plaintiffs in the above action, that he has read the above reply and that the same is true of his knowledge except as to such matters as are stated on information and belief, and, as to those, he believes them to be true.

B. RUPPE.

Subscribed and sworn to before me this 1st day of April, 1903.
[NOTARIAL SEAL.] O. N. MARRON,
Notary Public.

Endorsed: Filed in my office this Apr. 3, 1903. W. E. Dame, Clerk.

And Thereafter, on to-wit, the 3rd day of April, A. D. 1903, there was filed in the office of the clerk of said court, in said cause, Motion of Defendant Weinman to Strike Parts of Reply, which said Motion of Defendant Weinman to Strike Parts of Reply, is in words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO,
County of Bernalillo:

In the District Court.

40 No. 6173.

RICHARD DI PALMA and BERNARD RUPPE, Plaintiffs,
vs.
JACOB WEINMAN and JOSEPH BARNETT, Defendants.

Motion of Defendant Weinman to Strike Out Parts of the Reply of the Plaintiffs to the Answer of Defendant Weinman.

Now comes the defendant Jacob Weinman, by W. B. Childers his attorney, and moves the court to strike out so much of the reply of plaintiffs to the answer of Jacob Weinman, as alleges: "And these plaintiffs allege that by reason of the trespass and wrongful acts of said Weinman, the said building was rendered wholly uninhabitable and unfit for use, and the said Weinman from the time of said trespass until on or about the 25th day of July, 1902, continued to occupy said premises," for the following reasons:

1st. Said matter is not matter properly in reply to anything alleged in the answer of said defendant Jacob Weinman, and if pertinent at all to the issues in this case, should have been alleged in the complaint.

2nd. Because the said matter constitutes no cause of defense and is no defense to anything alleged in the answer of this defendant.

And the said defendant Jacob Weinman likewise moves the court to strike out so much of said reply as is in the following words: "at which time, the said Weinman, as plaintiffs are informed and
41 believe, executed and delivered to his said co-defendant, Barnett, a deed for said premises and thereby granted to his said co-defendant, Barnett, the premises described in said complaint and placed the *siad* Barnett in possession thereof, who has since occupied said premises as owner thereof," for the following reasons:

1st. The said matter does not constitute matter proper for reply, and is inconsistent with the admission in the reply that the plaintiffs had abandoned and surrendered the said premises to the said defendant Weinman prior to the said 25th day of July, 1902.

2nd. That the execution of said deed referred to did not convey to the said Barnett the right to the possession of the said property as against the tenant, but the grantee takes the property subject to the rights of the tenant.

3rd. Because the deed referred *is* and alleged to have been so made, is not made a part of said reply.

Wherefore, defendant Weinman, moves the court to strike such parts of the said reply, above specified, out.

W. B. CHILDERS,
Attorney for Defendant Weinman.

Endorsed: Filed in my office this Apr. 3, 1903, W. E. Dame, Clerk.

And Thereafter, on to-wit, the 4th day of April, A. D. 1902, there was entered of record in the office of the clerk of said court,
42 in said cause, an Order, which said Order is in words and figures as follows, to-wit:

No. 6173.

RICHARD DI PALMA et al.
vs.
JACOB WEINMAN et -l.

This cause coming on to be heard upon the motion of defendant Weinman to strike out parts of the reply of the plaintiffs to the answer of defendant Weinman.

The court, on consideration thereof sustains the same. To which the plaintiff duly excepts.

And Thereafter, on to-wit, the 12th day of October, A. D. 1909, there was entered of record in the office of the clerk of said court, in said cause, an Order Granting New Trial, which said Order is in words and figures as follows, to-wit:

No. 6173.

R. DI PALMA et al.
vs.
JOSEPH BARNETT et al.

Order Granting New Trial.

In accordance with the mandate in the above cause, this day filed.

It is ordered and adjudged that said cause be reinstated and a new trial granted.

And Thereafter, on to-wit, the 15th day of December, A. D. 1909, there was entered of record in the office of the clerk of said court in said cause, an Entry of Empaneling of Jury in Part, which said Entry is in words and figures as follows, to-wit:

43 No. 6173.

RICHARD DI PALMA et al.

vs.

JACOB WEINMAN et al.

Order.

Now on — day the parties come and being at issue, announce themselves ready for trial, whereupon they proceed to the empaneling of a jury to try said cause; and the regular panel of jurors, being exhausted by challenge, and the panel for the trial of said cause being incomplete, and talesman being required to complete the same;

It is ordered that a special venire facias be issued herein, returnable forthwith,

Whereupon the judge of this court, with the assistance of the clerk, of the court, and in the presence of a large number of representative citizens of the county who were in attendance on court and present in the court room, proceed- to draw from the jury box for the County of Bernalillo, the following names to complete said panel of Petit Jurors; the names so drawn being as follows, to-wit:

Jacob Fleming
E. C. Lippitt
C. R. McVey
Geo. D. Moore ..... Ex. for Dist.
L. G. Rosenfield
Cordero Garcia ..... " " "
A. S. Barrett
Wm. Archer
Antonio Padilla ..... " " "
Jose L. Gonzales ..... " " "
Alfredo J. Apodaca ..... " " "
44 Dario Gutierrez ..... " " "
Jacobo Candelaria ..... " " "
H. B. Thomas ..... " " "
N. Frieshman ..... " " "
Diego Sanchez ..... " " "
Jeray Driscoll
Selso Garcia ..... " " "
Geo. W. Arnot
P. Sanchez
J. J. Votaw
Lorenso Candelaria ..... Ex. for Dist.
Francisco Montano ..... " " "
O. H. Ford
Maximo A. Perea ..... " " "
Geo. Atkins
Leopoldo Apodaca ..... " " "
A. W. Williams ..... " " "
E. E. Edwards ..... " " "
C. E. Newcomer ..... " " "
Maximo Garcia ..... " " "
M. O. Chadburne
Espiridion Gomez
Montoso Campos ..... " " "

It is ordered by the court that a special venire facias returnable forthwith issue for all the above named persons, except those excused on account of distance, to serve as Petit Jurors in said cause at the present term of this court.

Whereupon the said special venire facias so ordered returnable forthwith is accordingly issued by the clerk of this court.

45 And the said special venire facias so issued returnable forthwith was this day duly returned by the sheriff with his endorsements thereon as follows:

"I, Sheriff of Bernalillo County, New Mexico, Certify that I received this venire on this the 15th day of December, 1909, and that I served the same on the 15th day of December, 1909, at my said county of Bernalillo by reading this venire to the following within named persons, to-wit: Jacob Fleming, C. R. McVey, L. G. Rosenfield, Geo. W. Arnot, P. Sanchez, M. O. Chadburn, R. L. Dodson.

I further certify that after diligent search I am unable to find the following within named persons, to-wit: E. C. Lippitt, A. S. Barrett, Wm. Archer, Jeray Driscoll, J. J. Votaw, Geo. Atkins, O. H. Ford, Espiridion Gomez. Jesus Romero, Sheriff. By R. Lewis, Dep., Fees $11.00.

And upon calling in open court the names of the said persons placed upon said special venire facias, the following appeared in answer thereto:

Jacob Fleming,
C. R. McVey,
L. G. Rosenfeld,
Geo. W. Arnot,
P. Sanchez,
M. O. Chadburn,
R. L. Dodson.

And for good cause shown the court excused:

Jacob Fleming,
C. R. McVey,
L. G. Rosenfeld,
Geo. W. Arnot,
P. Sanchez.

46 Whereupon the following were sworn and qualified according to the law as Petit Jurors, to-wit:

M. O. Chadburn and R. L. Dodson,

and their names were placed in a box and drawn therefrom by the Clerk one by one in such order as they chanced to be until being exhausted by challenge and the panel for the trial of said cause being incomplete and talesmen being required to complete the same.

It is ordered that a second special venire facias be issued herein returnable forthwith.

Whereupon the judge of this Court, with the assistance of the Clerk of the Court, and in the presence of a number of citizens of the County who were in attendance on court and present in the court room, proceed to draw from the jury box for the County of Bernalillo, the following names to complete said panel of Petit Jurors; the names so drawn being as follows, to-wit:

Julian Cano,
Federico Mayres ..... Ex. for Dist.
Jose Jaramillo ..... " " "
Jose Crespin ..... " " "
James Brown
Al Coleman,
J. F. Luthy,
Escolastico Garcia ..... " " "
Jose Gutierrez y Garcia ..... " " "
Frank McKee,
A. W. Hayden ..... Ex. Witness in this case.
Manuel Bustamente ..... Ex. for Dist.
I. Barreras,
Celso Aragon ..... " " "
47 Cornelio D. Murphy,
Antonio J. Garcia ..... " " "
G. A. Bassett,
Ike Graham,
Pablo Perea,
Eutemio Gutierrez ..... " " "
George Campfield,
Manuel Trujillo ..... " " "
M. Bragoi,
W. L. Hawkins ..... " " "
Salvador Munis ..... " " "
Gabino Anaya ..... " " "
Rafael Chavez, II ..... " " "
Juan Gutierrez ..... " " "
J. A. Kirster,
Manuel Montano ..... " " "
Leon B. Stern,
J. M. McCorriston ..... Ex. Witness in this case.
Juan Garcia ..... Ex. for Dist.
O. S. Pillsbury
Walter Jaffa,
R. S. Elwood,
Jose Montoya Sanches,
L. Hunsaker,
Frank Wertz,
F. J. Palmer,
Sotello Apodaca ..... " " "

It is ordered by the court that a special venire facias returnable forthwith issue for all the above named persons, except those excused

on account of distance and being witness- in this case, to serve as Petit Jurors in said cause at the present term of this court.

48 Whereupon the said special venire facias is accordingly issued by the Clerk of this court.

And upon calling the same in open court the following named persons appeared in answer to said special venire facias issued as aforesaid:

Julian Cano,
James Bonner,
Geo. Campfield,
J. F. Luthy,
Frank McKee,
Ike Graham,
Pablo Perea,
J. A. Kirster,
Leon B. Stern,
O. S. Pillsbury,
Walter Jaffa,
R. S. Elwood,
L. Hunsaker,
Frank Wertz,

And for good cause shown the court excused:

J. F. Luthy,
Frank McKee,
Pablo Perea,
Geo. Campfield,
O. S. Pillsbury,
Walter Jaffa,
Frank Wertz.

And the hour for adjournment having come, further proceedings in said cause are postponed until to-morrow morning at 9:20 o'clock.

And thereafter, on to-wit, the 16th day of December, A. D. 1909, there was entered of Record in the office of the Clerk of said

49 Court, in said cause an Entry Empaneling of Jury Concluded and Trial in Part, which said Entry is in words and figures as follows, to-wit:

No. 6173.

RICHARD DI PALMA et al.
vs.
JACOB WEINMAN et al.

Order.

Now on this day again come the parties herein and proceed with the empaneling of a jury to try said cause, and the following named

persons whose names were placed upon the second special venire facias issued in this cause appeared in answer thereto:

Julian Cano
James Bonner
Al Coleman
Ike Graham
J. A. Kirster
Leon B. Stern
R. S. Elwood
F. J. Palmer

And for good cause shown the court excused:

J. A. Kirster
Leon B. Stern
and F. J. Palmer.

Whereupon the following named persons were sworn and qualified according to law as Petit Jurors:

Julian Cano, Ika Graham, R. S. Elwood and L. Hunsaker, and their names were placed in a box and drawn therefrom by the clerk one by one in such order as they chanced to be until being exhausted by challenge and the panel for the trial of said cause being incomplete and talesmen being required to complete the same;

It is ordered that additional names be drawn from the jury box of Bernalillo County and placed upon the said second special venire facias issued herein.

Whereupon the judge of this court, with the assistance of the clerk of the court, and in the presence of a number of citizens of the county who were in attendance on court and present in the court room, proceed to draw from the jury box for said county the following names to complete said panel of Petit Jurors; the names so drawn being as follows, to-wit:

J. A. Hubbs
Juan N. Montoya
Julian Perea
and W. Bledsoe.

Whereupon all the above named persons were placed upon said second special venire facias by the clerk of this court as ordered; and the said special venire facias heretofore issued, returnable forthwith, was this day duly returned by the sheriff with his endorsements thereon as follows:

"I Sheriff of Bernalillo County, New Mexico, certify that this venire came to my hand on the 15th day of December, 1909, and that I served the same on the 15th day of December, 1909, at my said county by reading this venire to each of the following within named persons, to-wit: Julian Cano, Jas. Bonner, Al Coleman, J. F.

Luthy, Frank McKee, Cornelio D. Murphy, Ike Graham,
51 Pablo Perea, Geo. Campfield, J. A. Kirster, Leon B. Stern,
O. S. Pillsburry, Walter Jaffa, R. S. Elwood, L. Hunsaker, Frank Wertz, F. J. Palmer, Juan N. Montoya, Julian Perea, W. Bledsoe. I further certify that after diligent search I am unable to find the following within named persons, to-wit: I. Berreras, G. A. Bassett, Jose Montoya Sanchez, J. A. Hubbs. Fees, $11.50. Jesus Romero, Sheriff; by R. Lewis, Deputy Sheriff."

And upon calling in open court the names of the additional persons placed upon said second special venire facias by order of the court as aforesaid, the following appeared in answer thereto:

Juan N. Montoya, Julian Perea, W. Bledsoe.

And for good cause shown the court excused:

Juan N. Montoya and W. Bledsoe.

Whereupon the following named person was sworn and qualified according to law as a Petit Juror:

Julian Perea.

and his name was placed in a box and drawn therefrom by the clerk.

And the following named persons are accepted as Petit Jurors:

R. S. Elwood
Anastacio Gutierrez
L. O. Anderson
Francisco Ballegos
Ross Merritt
Julian Perea
Jose Aranda
L. Hunsaker
52 Mariano Duran
Ike Graham
Maximo Garcia
N. R. Swan,

who were duly empaneled and sworn, according to law, to try said cause, and the trial proceeds.

And the said jury having heard in part the evidence adduced by the parties herein, and the hour for adjournment having come, further hearing in said cause is postponed until tomorrow morning at 9:20 o'clock.

And Thereafter on to-wit, the 17th day of December, A. D. 1909, there was entered of record in the office of the clerk of this said court, in said cause, an Order, which said Order is in words and figures as follows, to-wit:

No. 6173.

RICHARD DI PALMA et al.
vs.
JACOB WEINMAN et al.

Order.

Now on this day again come the parties herein, and also comes the jury heretofore empaneled and sworn to try said cause, and the trial proceeds.

And the said jury having heard in part the evidence adduced by the parties herein, and the hour for adjournment having come, further hearing in said cause is postponed until tomorrow morning at 9:20 o'clock.

And Thereafter, on to-wit, the 18th day of December A. D. 1909, there was entered of record in the office of the clerk of this
53 said court, in said cause, an Order, which said Order is in words and figures as follows, to-wit:

No. 6173.

RICHARD DI PALMA et al.
vs.
JACOB WEINMAN et al.

Order.

Now on this day again come the parties herein, and also comes the jury heretofore empaneled and sworn to try said cause, and the trial proceeds.

And the said jury having heard in part the evidence adduced by the parties herein, and the hour for adjournment having come, further hearing in said cause is postponed until Monday morning, December 20th, 1909, at 9:20 o'clock.

And Thereafter, on to-wit, the 20th day of December, A. D. 1909, there was entered of record in the office of the clerk of this said court, in said cause, an Order, which said Order is in words and figures as follows, to-wit:

No. 6173.

RICHARD DI PALMA et al.
vs.
JACOB WEINMAN et al.

Order.

Now on this day again come the paties herein, and also comes the jury heretofore empaneled and sworn to try said cause, and the trial proceeds.

And the said jury having heard in part the evidence adduced by the parties herein, and the hour for adjournment having come, further hearing in said cause is postponed until tomorrow morning at 9:20 o'clock.

54 And Thereafter, on to-wit, the 21st day of December, A. D. 1909, there was entered of record in the office of the clerk of said court, in said cause, an Order, which said Order is in words and figures as follows, to-wit:

No. 6173.

RICHARD DI PALMA et al.
vs.
JACOB WEINMAN et al.

Order.

Now on this day again come the parties herein, and also comes the jury heretofore empaneled and sworn to try said cause, and the trial proceeds.

And the said jury having heard in part the evidence adduced by the parties herein, and the hour for adjournment having come, further hearing in said cause is postponed until tomorrow morning at 9:20 o'clock.

And Thereafter, on to-wit, the 22nd day of December, A. D. 1909, there was entered of record in the office of the clerk of said court, in said cause, an Order, which said Order is in words and figures as follows, to-wit:

No. 6173.

RICHARD DI PALMA et al.
vs.
JACOB WEINMAN et al.

Order.

Now on this day again come the parties herein, and also comes the jury heretofore empaneled and sworn to try said cause, and the trial proceeds.

And the said jury having heard in part the evidence adduced by the parties herein, and the hour for adjournment having
55 come, further hearing in said cause is postponed until tomorrow morning at 9:20 o'clock.

And Thereafter, on to-wit, the 23rd day of December, A. D. 1909, there was entered of record in the office of the clerk of said court, in said cause, an Order, which said Order is in words and figures as follows, to-wit:

No. 6173.

RICHARD DI PALMA et al.
vs.
JACOB WEINMAN et al.

Order.

Now on this day again come the parties herein, and also comes the jury heretofore empaneled and sworn to try said cause, and the trial proceeds.

And the said jury having heard in part the evidence adduced by the parties herein, and the hour for adjournment having come, further hearing in said cause is postponed until tomorrow morning at 9:20 o'clock.

And Thereafter, on to-wit the 24th day of December, A. D. 1909, there was entered of record in the office of the clerk of said court, in said cause, an Entry of Trial Concluded, Jury Disagree and Discharged, which said Entry is in words and figures as follows, to-wit:

No. 6173.

RICHARD DI PALMA et al.
vs.
JACOB WEINMAN et al.

Order.

Now on this day come the parties herein and also comes
56 the jury heretofore empaneled and sworn to try said cause, and the trial proceeds.

And the said jury having heard all the evidence adduced by the parties herein, the argument of counsel and charge of the court, retire to their room in charge of the bailiffs for deliberation.

And afterward come the said jury into open court and state to the court that they are unable to agree upon a verdict:

Thereupon it is ordered that the said jury be and it is hereby discharged from further consideration hereof, and said cause continued to a future time for trial.

And Thereafter, on to-wit, the 6th day of January, A. D. 1910, there was filed in the office of the clerk of said court in said cause, a Motion, which said Motion is in words and figures as follows, towit:

TERRITORY OF NEW MEXICO,
County of Bernalillo:

No. 6173.

RICHARD DI PALMA et al., Plaintiffs,
vs.
J. A. WEINMAN et al., Defendants.

Motion.

Comes now the defendant Joseph Barnett by Neill B. Field, his attorney, and moves the court for leave to file an amended answer in the above entitled cause, a copy of which is herewith tendered, and for ground the said motion shows to the court that as appears by the affidavit attached to the said answer, the said defendant was unaware of the existence of the facts set up in said amended
57 answer until after the 15th day of December, 1909, and the ends of justice require that he may now be permitted to file the same in defense of this action.

NEILL B. FIELD,
Attorney for Joseph Barnett.

Endorsed: Filed in my office this Jan. 6, 1910. John Venable, Clerk.

And Thereafter, on to-wit, the 6th day of January, A. D. 1910, there was filed in the office of the clerk of said court, in said cause, a Notice of Hearing on Motion to File Amended Answer of Barnett, which said notice is in words and figures, as follows, to-wit:

TERRITORY OF NEW MEXICO,
County of Bernalillo:

No. 6173.

RICHARD DI PALMA et al., Plaintiffs,
vs.
J. A. WEINMAN et al., Defendants.

To the Plaintiffs Richard Di Palma and B. Ruppe, and A. B. McMillen and Marron & Wood, their attorneys:

GENTLEMEN: You will please take notice that the defendant Joseph Barnett will apply to the Honorable Ira A. Abbott, sitting at Chambers at Albuquerque on Saturday, the 15th day of January, 1910, about the hour of 10:00 o'clock a. m., or as soon thereafter as counsel can be heard, to take up and dispose of the motion for leave to file an amended answer in the above entitled cause,
58 a copy of which said motion and answer are hereto attached, and you may appear and resist the said motion if you see fit to do so.

NEILL B. FIELD,
Attorney for Joseph Barnett.

Endorsed: Filed in my office this Jan. 6, 1910. John Venable, Clerk.

And Thereafter, on to-wit, the 6th day of January, A. D. 1910, there was tendered and offered to be filed in the office of the clerk, of said court, in said cause, an Amended Separate Answer of Joseph Barnett, which said Amended Separate Answer of Joseph Barnett, so tendered and offered to be filed is in words and figures as follows, to-wit:

Territory of New Mexico, Bernalillo District Court.

RICHARD DI PALMA and BERNARD RUPPE, Plaintiffs,
vs.
J. A. WEINMAN and JOSEPH BARNETT, Defendants.

Amended Separate Answer of Joseph Barnett.

Comes now the defendant Joseph Barnett by Neill B. Field, his attorney and by leave of the court first had and obtained amends his answer in the above entitled cause and for amended answer to the complaint of the plaintiffs says:

I.

That he is an entire stranger to all the matters and things
59 set forth and alleged in paragraphs one, two and three of the said complaint and has no knowledge or information sufficient to form a belief as to the truth of several allegations and he therefore denies the same and demands strict proof thereof.

Further answering this defendant denies that on or about the 30th day of June, 1902, he this defendant well knowing the facts set forth in paragraphs one, two and three of the said complaint or contriving to injury or destroy the property of the plaintiffs unlawfully entered upon the premises mentioned in said complaint or with force of arms or otherwise tore down or destroyed a large portion or any portion of the walls and roof of said store building; but this defendant admits that a portion of the roof and wall of said store building fell; but this defendant is informed and believes that the said wall fell because of its defective construction and because the same was old and out of repair and had fallen into decay and not by reason of any act done by this defendant; and this defendant alleges that the said roof fell because it was deprived of the support of said wall occasioned as herein alleged and not otherwise.

II.

This defendant on information and belief alleges that plaintiffs Richard Di Palma and B. Ruppe were not at the time of the commission of the alleged grievances in the said complaint set out owners of any merchandise which were contained in the building in

the complaint mentioned, and this defendant on information
60 and belief denies that any merchandise which was the property of the plaintiffs was injured, destroyed or damaged, and this defendant on information and belief denies every allegation of the said complaint with relation to the ownership and value of the merchandise in the complaint mentioned and calls for strict proof thereof.

III.

Defendant has no knowledge or information sufficient to form a belief as to the value of the leasehold as alleged in the said complaint but this defendant denies that the same was of the value of more than one thousand dollars over and above the rent stipulated in said lease or the same was of any value whatever or the same has been wholly or otherwise lost by reason of any act of this defendant and this defendant says that he is informed and believes and therefore charges that the plaintiffs voluntarily surrendered the premises mentioned in the complaint to his co-defendant Jacob Weinman whereby the estate of the said plaintiffs in the said premises became and was terminated and extinguished.

IV.

Further answering the defendant says that he has no knowledge or information sufficient to form a belief as to whether or not the business of the plaintiffs was profitable or otherwise and he is advised by counsel and believes and therefore charges that the value of the said plaintiffs' business is wholly immaterial in this cause;
61 but this defendant says that if the value of the plaintiffs' business as alleged in complaint is material in this cause then this defendant denies that the same was of any value whatever.

Having fully answered, this defendant prays to be hence dismissed with his cost in this behalf most wrongfully sustained.

NEILL B. FIELD,
Attorney for Defendant Barnett.

TERRITORY OF NEW MEXICO,
County of Bernalillo:

Joseph Barnett being first duly sworn upon his oath deposes and says, that he has heard read the foregoing amended answer and knows the contents thereof and that the allegations therein contained are true of his own knowledge, except as to those parts which are made on information and belief and as to said parts he believes same to be true; that he had no knowledge of the business relations of the plaintiffs, Richard Di Palma and B. Ruppe nor as to the nature and extent of such relations until after the commencement of the last trial of this case in the month of December, 1909, that this defendant has reason to believe and does believe that the plaintiff, Richard Di Palma at the time of the institution of this suit was a mere mortgagee of the merchandise and personal property mentioned in the complaint, and as such mortgagee the said Richard Di Palma was

not and is not entitled to maintain this action or to join as plaintiff therein.

Defendant further states that he obtained the information upon which this amended answer is based subsequent to the 15th
62 day of December, 1909.

JOE BARNETT.

Subscribed and sworn to by Joseph Barnett on this 30th day of December, 1909.

[NOTARIAL SEAL.] FELIPE J. GURULE,
Notary Public, Bernalillo County.

My commission expires May 1st, 1913.

Endorsed: Tendered and offered to be filed Jan. 6, 1910.

And Thereafter, on to-wit, the 15th day of January, A. D. 1910, there was tendered to be filed in the office of the clerk of said court, in said cause, an Amended Answer of Jacob Weinman, which said Amended Answer of Jacob Weinman, so tendered to be filed is in words and figures as follows, to-wit:

In the District Court of Bernalillo County, N. M.

RICHARD DI PALMA and BERNARD RUPPE, Plaintiffs,
vs.
JACOB WEINMAN and JOSEPH BARNETT, Defendants.

Amended Separate Answer of Jacob A. Weinman.

The defendant, Jacob A. Weinman by Edward A. Mann his attorney by leave of the court, first had and obtained, amends his answer in the above entitled cause for amended answer, and the complaint of the plaintiff says:

63 1.

That he admits the allegations in paragraphs 1 and 2 of said complaint.

2.

After the allegations in paragraph 3, said defendant denies that at the time of making of said lease, and up to the time of the injury in said complaint therein set up, there was upon the above described premises a substantial store building, but alleges that the building upon said premises was a one-story adobe, the foundation of which did not extend but a few inches below the surface of the ground, and the wall of the same was, at the time of the making of said lease, out of plumb, and defendant further alleges that the said plaintiff accepted the said building as being in good order and condition, and further covenanted that at the expiration of the said lease and the time mentioned therein, he would yield up the same to the defend-

ant, the lessor, in as good order and condition as when the same were entered upon by him and that he would keep the said premises in good repair during the term of said lease.

3.

This defendant further answering, denies that the plaintiffs Richard Di Palma and Bernard Ruppe occupied and used the said building in their business of prescription and retail druggists, together with their stock of drugs, patent medicines and other merchandise, furniture, fixtures, soda water fountain, tonophone and other personal property.

64

4.

As to the allegations in paragraph four of said complaint, this defendant denies that on the thirtieth day of June, 1902, that he unlawfully or otherwise entered upon the said premises, and with force and arms tore down and destroyed a large portion of the walls and roof of the said store building, or any portion thereof, so that the same fell upon, injured, broke and destroyed the property of the said plaintiffs, as in said paragraph alleged, so as to make the same unfit for plaintiffs' business, as therein alleged. Defendant further answering said paragraph four, of said complaint, denies that he entered in and upon the said premises during the pendency of said lease, or at any other time, and denies that he has continued to occupy the same or destroyed or tore down the rest of said building, as in said paragraph alleged. This defendant denies that the said leasehold was of great value, to-wit, of a value of more than one thousand dollars over and above the rent stipulated to *the* paid in said lease, as in said complaint alleged.

5.

This defendant further answering, denies that the business of the said plaintiffs, carried on in the said above described premises was worth to the plaintiff more than fifteen dollars per day over and above the expenses thereof, or that the plaintiff could have made that amount of money during the period of said lease or that he suffered damages in the sum of five thousand five hundred
65 dollars, as in said complaint alleged, or any other sum.

6.

Further answering, this defendant alleges, that the said plaintiff forfeited all his rights under the said lease, and terminated the same on or about the 1st day of July, A. D. 1902, by the failure and refusal to pay the rent reserved by the terms of said lease, that is to say, the sum of ninety dollars per month for the month of July, due and payable on the first day of July, 1902, which said sum this defendant avers, he demanded payment of the said plaintiff and said plaintiff then and there refused and still refuses to pay the same or any part of the rent reserved under the terms of the said lease; and that by reason of such refusal, the plaintiffs' right to have posse-

sion, and the use and enjoyment of said premises, terminated on the thirtieth day of June, 1908.

Wherefore, by reason of the matters and things set forth in this his answer, this defendant prays to be hence dismissed with his costs.

———, ———,

Attorney for Defendant Jacob A. Weinman.

TERRITORY OF NEW MEXICO,
County of Bernalillo, ss:

Jacob A. Weinman, of lawful age, being duly sworn, upon oath, deposes and says: That he is one of the defendants in the above entitled cause; that he has heard read the foregoing answer, and knows the contents thereof, and that the matters and things therein set forth are true, except such as are therein stated to be upon
66 information and belief, and as to those he believes them to be true.

JACOB A. WEINMAN.

Subscribed and sworn to before me this 3rd day of January, A. D. 1910.

[NOTARIAL SEAL.] JOSIE L. HARRIS,
Notary Public.

Endorsed: Tendered to be filed Jan. 15-10.

And thereafter, on to-wit, the 15th day of January, A. D. 1910, there was entered of record in the office of the clerk of said court, in said cause, an Order, which said order is in words and figures as follows, to-wit:

No. 6173.

RICHARD DI PALMA et al.
vs.
J. A. WEINMAN et al.

Order.

This day this cause came on for hearing on motion of the defendant, J. A. Weinman, to file amended answer herein, was argued by counsel and submitted to the court.

And Thereafter, on to-wit, the 19th day of January, A. D. 1910, there was entered of record in the office of the clerk of said court, in said cause, an Order, which said order is in words and figures as follows, to-wit:

No. 6173.

RICHARD DI PALMA et al.
vs.
J. A. WEINMAN et al.

Order.

This cause having heretofore been heard on motion of de-
67 fendants to file amended answers herein, was argued by counsel and submitted to the court.

And now on this day the court being sufficiently advised in the premises finds that said motion is not well taken and ought to be overruled;

Whereupon it is considered, ordered and adjudged that defendant's motion to file amended answers herein be and the same hereby is overruled; to which ruling of the court the defendants severally except.

And Thereafter, on to-wit, the 30th day of March, A. D. 1910, there was entered of record in the office of the clerk of said court, in said cause, an Order, which said Order is in words and figures as follows, to-wit:

March Term, March 30, 1910.

Court met pursuant to adjournment.

Present: Hon. Ira A. Abbott, Judge; John Venable, Clerk; George S. Klock, District Attorney; Jesus Romero, Sheriff; Nestor Montoya, Interpreter: Harry P. Owen, Stenographer.

No. 6173.

RICHARD DI PALMA et al.
vs.
J. A. WEINMAN et al.

Order.

This day this cause came on for trial, the parties being at issue, and a jury being called, to-wit:

Pedro Baca
Pedro Lobato
Santiago Sais
Pedro Candelaria
Jose Sais.
68 Pablo Baca
Mariano Garcia
Manuel Griego
Onesirno Lucero
Diego R. Armijo
Juan Sais
Oben Apodaca

who were duly empaneled and sworn according to law to try said cause, and the trial proceeds.

And the said jury having heard in part the evidence adduced by the parties herein, and the hour for adjournment having come, further hearing in said cause is postponed until tomorrow morning at 9:30 o'clock.

And Thereafter, on to-wit, the 31st day of March, A. D. 1910, there was entered of record in the office of the clerk of said court, in said cause, an Order, which said Order is in words and figures as follows, to-wit:

March Term, March 31, 1910.

Court met pursuant to adjournment.

Present: Hon. Ira A. Abbot, Judge; John Venable, Clerk; George S. Klock, District Attorney; Jesus Romero, Sheriff; Nestor Montoya, Interpreter; Harry P. Owen, Stenographer.

No. 6173.

RICHARD DI PALMA et al.
vs.
JACOB WEINMAN et al.

Order.

Now on this day again come the parties herein, and also come the jury heretofore empaneled and sworn to try said cause, and the trial proceeds.

69 And the said jury having heard in part the evidence adduced by the parties herein, and the hour for adjournment having come, further hearing in said cause is postponed until tomorrow morning at 9:30 o'clock.

And thereafter, on to-wit, the 1st day of April A. D. 1910, there was entered of record in the office of the clerk of said court, in said cause, an Order, which said Order is in words and figures as follows, to-wit:

March Term, April 1st, 1910.

Court met pursuant to adjournment.

Present: Hon. Ira A. Abbott, Judge; Thos. K. D. Maddison, Clerk; George S. Klock, District Attorney; Jesus Romero, Sheriff; Nestor Montoya, Interpreter; Harry P. Owen, Stenographer.

No. 6173.

RICHARD DI PALMA et al.
vs.
JACOB WEINMAN et al.

Order.

Now on this day again come the parties herein, and also come the jury heretofore empaneled and sworn to try said cause, and the trial proceeds.

And the said jury having heard in part the evidence adduced by the parties herein, and the hour for adjournment having come, further hearing in said cause is postponed until tomorrow morning at 9:30 o'clock.

And thereafter, on to-wit, the 2nd day of April, A. D. 1910, there was entered of record in the office of the clerk of said court, in
70 said cause, an Order, which said Order is in words and figures as follows, to-wit:

March Term, April 2nd, 1910.

Court met pursuant to adjournment.

Present: Hon. Ira A. Abbott, Judge; Thos. K. D. Maddison, Clerk; George S. Klock, District Attorney; Jesus Romero, Sheriff; Nestor Montoya, Interpreter; Harry P. Owen, Stenographer.

No. 6173.

RICHARD DI PALMA et al.
vs.
JACOB WEINMAN et al.

Order.

This day again come the parties herein, and also come the jury heretofore empaneled and sworn to try said cause, and the trial proceeds.

And the said jury having heard the evidence in part adduced by the parties herein, and the hour for adjournment having come, further hearing in said cause is postponed until Monday morning, April 4th, 1910, at 9:30 o'clock.

And thereafter, on to-wit, the 4th day of April, A. D. 1910, there was entered of record in the office of the clerk of said court, in said cause, an Order, which said Order is in words and figures as follows, to-wit:

March Term, April 4th, 1910.

Court met pursuant to adjournment.
Present: Hon. Ira A. Abbott, Judge; Thos. K. D. Maddison, Clerk; George S. Klock, District Attorney; Jesus Romero, Sheriff; Nestor Montoya, Interpreter; Harry P. Owen, Stenographer.

71 No. 6173.

RICHARD DI PALMA et al.
vs.
JACOB WEINMAN et al.

Order.

Now on this day again come the parties herein, and also come the jury heretofore empaneled and sworn to try said cause, and the trial proceeds.
And the said jury having heard the evidence in part adduced by the parties herein, and the hour for adjournment having come, further hearing in said cause is postponed until tomorrow morning at 9:30 o'clock.

And thereafter, on to-wit, the 5th day of April, A. D. 1910, there was entered of record in the office of the clerk of said court, in said cause, an Order, which said Order is in words and figures as follows, to-wit:

March Term, April 5th, 1910.

Court met pursuant to adjournment.
Present: Hon. Ira A. Abbott, Judge; Thos. K. D. Maddison, Clerk; George S. Klock, District Attorney; Jesus Romero, Sheriff; Nestor Montoya, Interpreter; Harry P. Owen, Stenographer.

No. 6173.

RICHARD DI PALMA et al.
vs.
JACOB WEINMAN et al.

Order.

Now on this day again came the parties herein, and also came the jury heretofore empaneled and sworn to try said cause, and the trial proceeds.
And the said jury having heard the evidence in part adduced by the parties herein, and the hour for adjournment having
72 come, further hearing in said cause is postponed until tomorrow morning at 9:30 o'clock.

And thereafter, on to-wit, the 6th day of April, A. D. 1910, there was entered of record in the office of the clerk of said court, in said cause, an Order, which said Order is in words and figures as follows, to-wit:

March Term, April 6th, 1910.

Court met pursuant to adjournment.
Present: Hon. Ira A. Abbott, Judge; Thos. K. D. Maddison, Clerk; George S. Klock, District Attorney; Jesus Romero, Sheriff; Nestor Montoya, Interpreter; Harry P. Owen, Stenographer.

No. 6173.

RICHARD DI PALMA et al.
vs.
JACOB WEINMAN et al.

Order.

Now on this day again came the parties herein and also came the jury heretofore empaneled and sworn to try said cause, and the trial proceeds.
And the said jury having heard the evidence in part adduced by the parties herein, and the hour for adjournment having come, further hearing in said cause is postponed until tomorrow morning at 9:30 o'clock.

And thereafter, on to-wit, the 7th day of April, A. D. 1910, there was entered of record in the office of the clerk of said court, in said cause, an Order, which said Order is in words and figures as follows, to-wit:

73 March Term, April 7th, 1910.

Court met pursuant to adjournment.
Present: Hon. Ira A. Abbott, Judge; Thos. K. D. Maddison, Clerk; George S. Klock, District Attorney; Jesus Romero, Sheriff; Nestor Montoya, Interpreter; Harry P. Owen, Stenographer.

No. 6173.

RICHARD DI PALMA et al.
vs.
JACOB WEINMAN et al.

Order.

Now on this day again came the parties herein and also came the jury heretofore empaneled and sworn to try said cause, and the trial proceeds.

And the said jury having heard the evidence in part adduced by the parties herein, and the hour for adjournment having come, further hearing in said cause is postponed until tomorrow morning at 9:00 o'clock.

And thereafter, on to-wit, the 8th day of April, A. D. 1910, there was entered of record in the office of the clerk of said court, in said cause, an Order, which said Order is in words and figures as follows, to-wit:

March Term, April 8th, 1910.

Court met pursuant to adjournment.
Present: Hon. Ira A. Abbott, Judge; Thos. K. D. Maddison, Clerk; George S. Klock, District Attorney; Jesus Romero, Sheriff; Nestor Montoya, Interpreter; Harry P. Owen, Stenographer.

74 No. 6173.

RICHARD DI PALMA et al.
vs.
JACOB WEINMAN et al.

Order.

Now on this day again came the parties herein, and also came the jury heretofore empaneled and sworn to try said cause, and the trial proceeds.
And the said jury having heard all the evidence adduced by the parties herein, the argument of counsel and charge of the court, retire to their room, in charge of the bailiffs, for deliberation.
It is ordered that court do now take a recess until further order.

And Thereafter, on to-wit, the 9th day of April, A. D. 1910, there was filed in the office of the clerk of the said court in said cause, a Tendered Verdict, which said Tendered Verdict is in words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO,
Bernalillo County:

In the District Court.

No. 6173.

RICHARD DI PALMA and BERNARD RUPPE, Plaintiffs,
vs.
JOSEPH BARNETT and J. A. WEINMAN, Defendants.

We, the jury, find the issues for the plaintiffs and assess their damages at Five Thousand Dollars and 6 per cent interest.

DIEGO P. ARMIJO, *Foreman.*

Endorsed: Filed in my office this Apr. 9, 1910, Thos. K. D. Maddison, Clerk.

75 And Thereafter, on to-wit, the 9th day of April, A. D. 1910, there was entered of record in the office of the clerk of said court, in said cause, an Order, which said Order is in words and figures as follows, to-wit:

March Term, April 9th, 1910.

It is ordered that court do now re-convene pursuant to the order of recess heretofore entered.

Present: Hon. Ira A. Abbott, Judge; Thos. K. D. Maddison, Clerk; George S. Klock, District Attorney; Jesus Romero, Sheriff; Nestor Montoya, Interpreter; Harry P. Owen, Stenographer.

No. 6173.

RICHARD DI PALMA et al.
vs.
JACOB WEINMAN et al.

Order.

And now come the jury herein again into open court and through its foreman, return the following verdict, in writing, to-wit:

"We, the jury, find the issues for the plaintiffs and assess their damage at Seven Thousand Seven Hundred and 38 Dollars in Total Amt.

DIEGO P. ARMIJO, *Foreman.*"

And now the said jury also in pursuance of the instructions of the court at the request of the defendants, also return the following special findings in writing, to-wit:

I.

Did the plaintiffs have reasonable grounds for apprehension that the wall of the building occupied by them might fall as the result of excavations being made in lot number one?

76 No Sir.

DIEGO P. ARMIJO, *Foreman.*

II.

Could the plaintiffs by the use of means reasonably within their reach, have protected themselves from damage by the falling of the wall of the building occupied by them?

No Sir.

DIEGO P. ARMIJO, *Foreman.*

III.

What if anything did the plaintiffs do, toward protecting themselves from loss or damage to their property by the falling of the wall of the building occupied by them?
No Sir.

DIEGO P. ARMIJO, *Foreman.*

IV.

Ought the plaintiffs as reasonable men to have anticipated the fall of the wall of the building occupied by them?
Yes sir.

DIEGO P. ARMIJO, *Foreman.*

V.

Did the excavation under the foundation at the northeast corner of the building occupied by plaintiffs cause the crack in the wall at the top and fifty-three feet south of the corner of said wall described by the witnesses?
77 Yes Sir.

DIEGO P. ARMIJO, *Foreman.*

VI.

Was the east wall of the building occupied by plaintiffs out of plumb, if so to what extent?
It was. About 2 inches.

DIEGO P. ARMIJO, *Foreman.*

VII.

Did the east wall of the building occupied by plaintiffs bulge lengthwise, about two and one-half feet above the foundation, for its full length back to the point where the wall broke?
No Sir.

DIEGO P. ARMIJO, *Foreman.*

VIII.

Was the first indication of weakness in the wall which fell manifested by a crack at the top of the wall fifty-three feet south of the northeast corner of the building?
No Sir.

DIEGO P. ARMIJO, *Foreman.*

IX.

Was there any other crack or break in the wall which fell apparent at any time before the wall actually fell?
No Sir.

DIEGO P. ARMIJO, *Foreman.*

78 X.

State how much of the foundation under the wall that fell remained in place; how much of said foundation was displaced and to what extent any part of said foundation was displaced?

About one-fourth of it fell on the excavation and the rest of it remained on its place.

DIEGO P. ARMIJO, *Foreman.*

XI.

Was the fall of the wall of the building occupied by plaintiffs caused in any degree by lack of lateral support for the ground on which it stood?

No Sir.

DIEGO P. ARMIJO, *Foreman.*

XII.

Was there any excavation under the foundation of the wall of the building occupied by plaintiffs except the one at the northeast corner of the building?

Yes Sir.

DIEGO P. ARMIJO, *Foreman.*

XIII.

Were there any excavations on lot number one which were not under the foundation of the building occupied by plaintiffs but were flush with the wall, if so, how many such excavations were there; how deep was each and where was each of them located?

Yes Sir; there were two the first one was about 25 ft. south and about 2 and ½ ft. deep and the 2nd was about 50 ft. from
79 the front and about 3 ft. deep.

DIEGO P. ARMIJO, *Foreman.*

And now the defendants, by their attorneys, give notice of a motion to set aside the verdict and grant them a new trial.

And Thereafter, on to-wit, the 9th day of April, 1910, there were filed in the office of the clerk of said court, in said cause, a Verdict and Special Findings of the Jury, which said Verdict and Special Findings are made a part of the record by being incorporated in the bill of exceptions and are therefore, in accordance with the praecipe for transcript of the record, not included in the clerk's record proper but reference is made to the same as they appear in the bill of exceptions, hereto annexed.

And Thereafter, on the 12th day of April, 1910, there was filed in the office of the clerk of said court, in said cause, a Motion of Defendant Barnett for a New Trial, and also a Motion of Defendant Weinman for a New Trial, which said Motions for New Trials are made a part of the record by being incorporated in the bill of ex-

ceptions and are therefore, in accordance with the præcipe for transcript of the record, not included in the clerk's record proper but reference is made to said motions as they appear in the bill of exceptions hereto annexed.

80 And Thereafter, on to-wit, the 2nd day of June, A. D. 1910, there was entered of record in the office of the clerk of said court, in said cause, an Order, which said Order is in words and figures as follows, to-wit:

No. 6173.

BERNARD RUPPE et al.
vs.
JACOB WEINMAN.

Order.

This cause coming on to be heard upon the motion of the defendant, Joseph Barnett, for a new trial, and the court having heard counsel for the respective parties and being fully advised in the premises, finds that said motion is not well taken and ought to be denied: Whereupon, it is considered, ordered and adjudged that the motion of Joseph Barnett for a new trial herein be, and it is hereby denied; to which action of the court the said defendant excepts.

And this cause coming on likewise for hearing on the motion of the defendant, Jacob Weinman, for a new trial, and the court having heard counsel for the respective parties and being fully advised in the premises, finds that said motion is not well taken and ought to be overruled: Whereupon, it is considered, ordered and adjudged that the motion of Jacob Weinman, for a new trial herein be, and it is hereby denied; to which action of the court the defendant excepts.

And Thereafter, on to-wit, the 16th day of June, A. D. 1910, there was filed and entered of record in the office of the clerk
81 of said court, in said cause, a Judgment, which said Judgment is in words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO:

In the District Court, Bernalillo County.

RICHARD DI PALMA et al., Plaintiffs,
vs.
JACOB WEINMAN et al., Defendants.

This cause coming on for hearing upon the motion of the defendant, Jacob Weinman, for a new trial, and also upon the motion

of the defendant, Joseph Barnett, for a new trial, and the court being fully advised in the premises, finds that said motions are not well taken.

It is therefore ordered and adjudged that the said motions and each of them, be, and the same is hereby overruled, to which ruling of the court, the respective defendants by their counsel excepted and thereupon the said plaintiffs, by their counsel asked for judgment in accordance with the verdict of the jury heretofore rendered herein, and thereupon

It is considered and adjudged by the court that the said plaintiffs do have and recover from the said defendants, the said sum of Seven Thousand Seven Hundred Thirty-eight dollars ($7738.00) so found by the verdict of the jury herein, which said judgment shall bear interest at the rate of six per cent per annum from April 9th, 1910, the day upon which said verdict was rendered and have execution therefor.

It is further considered and adjudged by the court that the
82 said plaintiffs recover from the said defendants their costs herein to be fixed. To all of which defendants and each of them duly except.

IRA A. ABBOTT, *Judge.*

Endorsed: Filed in my office this June 16, 1910. Thos. K. D. Maddison, Clerk.

And Thereafter, on to-wit, the 16th day of June, A. D. 1910, there was filed and entered of record in the office of the clerk of said court, in said cause, an Order Granting Appeal, which said Order is in words and figures as follows, to-wit:

In the District Court of Bernalillo County, Territory of New Mexico.

No. 6173.

RICHARD DI PALMA and BERNARD RUPPE, Plaintiffs,
vs.
JACOB WEINMAN and JOSEPH BARNETT, Defendants.

Order Granting Appeal.

Now on this 16 day of June, 1910, this cause coming on to be heard upon the defendants' separate motions for appeal to the Supreme Court of the Territory of New Mexico, in this cause, the plaintiffs appearing by their counsel and the defendants appearing by their respective counsel, and all parties being now in court each of the defendants separately prays an appeal from the judgment this day rendered in this cause to the Supreme Court of the Territory of New Mexico and for a supersedeas of the judgment rendered in this cause, pending said appeal, and the court having
83 heard counsel and being fully advised in the premises; an appeal is hereby granted to each of said defendants in open

court and a supersedeas of the judgment this day rendered is granted, providing that the defendants within sixty days file a Supersedeas Bond, in double the amount of said judgment, conditioned as provided by law.

Done at Albuquerque, New Mexico, this 16 day of June, A. D. 1910.

IRA A. ABBOTT,
Associate Justice of the Supreme Court and
Judge of the Second Judicial District Thereof.

Endorsed: Filed in my office this Jun. 16, 1910. Thos. K. D. Maddison, Clerk.

And Thereafter, on to-wit, the 16th day of June, A. D. 1910, there was filed in the office of the clerk of said court, in said cause, a Supersedeas Bond, which said Bond is in words and figures as follows, to-wit:

Territory of New Mexico, Bernalillo District Court.

No. 6173.

RICHARD DI PALMA and B. RUPPE, Plaintiffs,
vs.
J. A. WEINMAN and JOSEPH BARNETT, Defendants.

Supersedeas Bond.

Know all men by these presents that we, Joseph Barnett and J. A. Weinman, as principals, and M. W. Flournoy and Ivan Grunsfeld, as sureties, are held and firmly bound unto Richard Di Palma and B. Ruppe in the penal sum of Sixteen Thou-
84 sand ($16,000.00) Dollars, lawful money of the United States of America, for the payment of which well and truly to be made, we bind ourselves, and our and each of our heirs, executors and administrators jointly and severally, firmly by these presents.

Sealed with our seals and dated this 16th day of June, 1910.

The Conditions of the foregoing obligation are such that whereas, on the 16th day of June, 1910, in the District Court of the County of Bernalillo, in the Territory of New Mexico, the said Richard Di Palma and B. Ruppe recovered a judgment against the said Joseph Barnett and J. A. Weinman, for the sum of Seven Thousand Seven Hundred Thirty Eight Dollars damages and costs of suit and whereas, the said Joseph Barnett and J. A. Weinman have prayed for and obtained an appeal from the said judgment to the Supreme Court of the Territory of New Mexico,

Now Therefore, if the said Joseph Barnett and J. A. Weinman shall well and truly prosecute their said appeal with effect, and shall abide the judgment of the said Supreme Court in the premises, and pay all costs and damages which may be adjudged against them on

the said appeal, then this obligation to be null and void, otherwise to remain in full force and effect.

Witness our hands:

JOSEPH BARNETT. [SEAL.]
J. A. WEINMAN. [SEAL.]
M. W. FLOURNOY. [SEAL.]
IVAN GRUNSFELD. [SEAL.]

85 TERRITORY OF NEW MEXICO,
County of Bernalillo:

Be it remembered that on this 16th day of June, 1910, before me personally appeared Joseph Barnett and J. A. Weinman, M. W. Flournoy and Ivan Grunsfeld, to me well and personally known to be the persons named in and who executed the foregoing instrument, and severally acknowledged that they executed the same as their free act and deed.

And the said M. W. Flournoy and Ivan Grunsfeld, being by me, duly sworn, each for himself and not one for the other, on his oath deposes and says, that he is worth the sum of Sixteen Thousand ($16,000.00) Dollars, over and above all his just debts and liabilities, in property subject to execution in the Territory of New Mexico.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal the day and year last above written.

[SEAL.] HAROLD B. JAMISON,
Notary Public, Bernalillo Co., N. M.

My commission expires Jan. 10, 1914.

The above and foregoing bond, as to form and sufficiency approved by me this 16 day of June, 1910.

By the court.

THOS. K. D. MADDISON,
Clerk of the District Court of the Second Judicial District.

Endorsed: Filed in my office this Jun- 16, 1910, Thos K. D. Maddison, Clerk.

86 And Thereafter, on to-wit, the 26th day of September, A. D. 1910, there was filed and entered of record in the office of the clerk of said court, in said cause, an Order, which said Order is in words and figures as follows, to-wit:

In the District Court of the Second Judicial District Within and for the County of Bernalillo, Territory of New Mexico.

No. —.

RICHARD DI PALMA and BERNARD RUPPE, Plaintiffs,
vs.
JOSEPH BARNETT and JACOB WEINMAN, Defendants.

Order.

Now on this the 26th day of September, A. D. 1910, this cause having come on to be heard on the motion of the defendants for an extension of time for settling and signing the bill of exceptions and the extension of the return day in the Supreme Court of the Territory of New Mexico in said cause, and the court having heard counsel for said defendants and being satisfied that the bill of exceptions and transcripts can not be made up within the time provided by law—

It is therefore ordered and adjudged that the time for settling and signing the bill of exceptions and the extension of the return day in the Supreme Court be, and the same hereby is extended 30 days from the return day in said cause, the same being the 24th day of October, A. D. 1910.

87 Done on this the 26th day of September, A. D. 1910.

IRA A. ABBOTT, *Judge.*

Endorsed: Filed in my office this Sept. 26, 1910. Thos. K. D. Maddison, Clerk.

And Thereafter, on to-wit, the 15th day of October, A. D. 1910, there was filed in the office of the clerk of said court, in said cause, a Præcipe for Transcript of Record, which said Præcipe is in words and figures as follows, to-wit:

Territory of New Mexico, Bernalillo District Court.

No. 6173.

RICHARD DI PALMA and BERNARD RUPPE, Plaintiffs,
vs.
J. A. WEINMAN and JOSEPH BARNETT, Defendants.

Præcipe for Transcript of Record.

To the Clerk of the District Court:

The defendants and appellants in the above entitled cause hereby require you to make a transcript of the record therein for use upon their last appeal in said cause, to consist of the following:

I.

The pleadings and exhibits filed therewith in said cause.

II.

The motion of defendants for a bill of particulars, with the order of the court thereon, and the bill of particulars filed in pursuance thereof.

III.

88 The motion of the defendant Weinman to strike out parts of the reply of the plaintiff- to the answer of the defendant Weinman, and the order of the court sustaining same.

IV.

The order of the court reinstating the said cause after the filing of the mandate of the Supreme Court therein on October 12th, 1909, and all orders and journal entries made and entered in the said cause subsequent thereto, including all motions filed, with the action of the court thereon, and especially including the verdict, the special findings, the motions of the defendants for a new trial, and the orders overruling same, and the order granting an appeal in said cause.

V.

All pleadings tendered and offered to be filed in said cause subsequent to the reinstatement thereof, whether the same were permitted to be filed or not.

VI.

The supersedeas bond of the defendants.

VII.

The bill of exceptions when settled and signed by the court.

VIII.

This præcipe.

You are especially directed, however, not to duplicate motions or pleadings in the cause, but where any such papers are referred to in the bill of exceptions they may be omitted from the record proper, provided reference is made to the bill of exceptions for the same.

EDWARD A. MANN,

89 *Attorney for Defendant and Appellant Weinman.*

NEILL B. FIELD,

Attorney for Defendant and Appellant Barnett.

Endorsed: Filed in my office this Oct. 15, 1910. Thos. K. D. Maddison, Clerk.

And Thereafter, on to-wit, the 9th day of November, 1910, there was filed in the office of the clerk of said court in said cause, a Bill of Exceptions, which said Bill of Exceptions is in words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO,
Bernalillo County:

In the District Court.

No. 6173.

RICHARD DI PALMA and BERNARD RUPPE, Plaintiffs,
vs.
J. A. WEINMAN and JOSEPH BARNETT, Defendants.

Trial.

Before Honorable Ira A. Abbott, Judge, Presiding, and Jury, on this 30th Day of March, 1910, at the Regular March, 1910, Term of said Court.

Appearances:

For the plaintiffs, Messrs. A. B. McMillen and Marron & Wood.
For the defendant, J. A. Weinman, Mr. E. A. Mann.
For the defendant, Joseph Barnett, Mr. Neill B. Field.

This cause coming on for trial, the following proceedings were had preliminary to the trial, which the court directed the stenographer to note.

90 Judge MANN: Now comes the defendant Jacob Weinman and moves the court for a continuance of this cause until the next regular term of this court, for the reason that the defendant Weinman is in no condition physically to attend at this term of court, and that the said defendant Weinman is and has been, for several weeks last past, under the care of Dr. Hope, of Albuquerque, his physician, and is suffering from eczema and is unable to attend at this term, which motion is supported by the affidavit of Dr. W. G. Hope and the said defendant Weinman, to be filed.

I want to add to that, that the defendant Weinman further states that it is necessary for him to be present at said trial and to assist his counsel in the securing of the jury for said trial; that said defendant is an important witness in his own behalf and it is necessary that he be present to give his testimony in this case.

Mr. FIELD: I move, on behalf of the defendant Barnett, not for a continuance, but for a postponement of the calling of this case, until such time as there has been reasonable opportunity to have Mr. Cullodon to get here or for the defendant Barnett to ascertain whether he is unable to come; and to state, on behalf of defendant Barnett, that Mr. Cullodon is an old man who resides, as I am informed, more than one hundred miles of the court house. He has always attended the trial heretofore, on request, and there was no reason to suspect he did not do so now or that he will not

91 come now if possible -or him to come; that on the day on which this case was assigned to trial, letters were addressed

to Mr. Cullodon at his usual postoffice address by counsel for Mr. Barnett, and for Mr. La Driere also, on behalf of Mr. Barnett, and up to this morning no reply has been received from those letters, and, according to my belief, sufficient time has not elapsed to enable us to have had a reply, although as to that, I am not certain that sufficient time has not elapsed; that the defendant cannot safely go to trial without the evidence of Cullodon, and the defendant Barnett is ready for trial and asks no delay, on condition that the court will order, if Mr. Cullodon is unable to get here, that his testimony as given on the former trial of the case, may be read to the jury.

Mr. WOOD: Replying to the motion of Judge Mann for a continuance because of the illness of Mr. Weinman, one of the defendants, the plaintiffs object to the continuance, upon the ground that the facts stated are not sufficient to comply with the statute as a reason for the continuance, in that it does not appear that Mr. Weinman is a necessary witness without whose testimony the plaintiff cannot safely go to trial; on the further ground that it does not appear that Mr. Weinman is so seriously ill that he cannot safely attend, but that merely it would be an inconvenience, or disagreeable for him to do so; that Mr. Weinman is neither a necessary nor a material witness for the defense, as appears by the record
92 of this case from the former trials; and upon the further ground that this motion was not timely made and was not made until the case was called for trial, although the condition has existed for some time, in support of which the plaintiffs will file affidavits as to the condition of Mr. Weinman.

The COURT: What condition do you expect to show?

Mr. WOOD: We expect to show that Mr. Weinman is entirely able, without serious danger to his health, to be present at this trial; that he is, at the present time, upon the streets every day attending, in some measure, a least, to his duties, and that he can attend this trial without any serious damage to his health or danger to his health.

The COURT: Now, as to the other matter.

Mr. WOOD: Now, as to the motion for the postponement on account of the witness Cullodon being unable to be present, or to require that his testimony given at the last trial here be read; if he is not present, the plaintiffs object to any continuance, upon the ground that the defendant Barnett has not shown any proper effort or diligence to procure the attendance of the witness Cullodon here; that no subpœna has been served, attempted to be served, or even applied for, to produce him here; that the witness Cullodon is within the reach of a subpœna or process of this court, and can be compelled to attend here; that notice of this trial was given
93 on behalf of the plaintiffs immediately at the close of the former term of court; that as soon as the calendar of this court was arranged, by personal letter of counsel to both defendants, plaintiffs advised them that this case would be moved on the first day of the session of the petit jury at this term and that the trial would then he insisted upon. that about ten days ago, Mr. Field, representing the defendant Barnett, requested the plaintiffs—that they would consent that the testimony of this witness be read, and

plaintiffs' attorneys then advised Mr. Field that they desired that that witness be personally present, and that they would not consent.

The COURT: Did you say that was within ten days?

Mr. WOOD: No, I won't say ten days; it was about ten days ago—I could not be entirely accurate as to this being ten days ago, but it was the day after Mr. Field made the request, and I think about ten days ago; and the defendants have shown no diligence in attempting to produce the witness here.

The COURT: As to the illness of Mr. Weinman, the court understands from the statements of counsel made here, that he is not confined to his house; he is suffering from eczema but is out daily attending to his business, to some extent, daily; under those circumstances a continuance is not warranted, as it seems to the court, in view of the expense and inconvenience to which it would necessarily subject the plaintiffs. As to the matter of the witness
94 Cullodon, it will have to be attended to when it is reached: circumstances may change before that time: other information may be had and it may appear, possibly, by that time, that the witness is not living or that he is sick and could not be here; in which case, there will be no question of the admissibility of his evidence; on the other hand, there might be circumstances which would then prevent the court from admitting his testimony to be read, as given in the former trials.

Mr. MANN: The defendant Weinman, by his counsel, objects to the ruling of the court in overruling defendants' motion for a continuance.

Mr. FIELD: The defendant Barnett objects also, as I understand the court to overrule the application for a postponement.

The COURT: No, I did not overrule it: I said the matter would have to be attended to and reached upon the circumstances then appearing.

Mr. FIELD: I think it is reached now; I asked the court not to call the case until a reasonable time has gone by, so as to hear from Mr. Cullodon.

The COURT: I did not understand you to ask that. I understood you to ask the court now to rule that the testimony be admitted.

Mr. FIELD: I asked the court not to call the case at this time unless the court would provide, at the time of the calling of the case, that if Cullodon does not get in that his testimony should be read.
95 The COURT: In that sense, your motion for such action of the court at this time is overruled.

Mr. FIELD: Exception.

Mr. WOOD: The plaintiffs now move the case for trial.

Mr. FIELD: Before the jury is called, I desire, on behalf of the defendant Barnett, to challenge the array of the petit jury, on the ground that they were not selected, summoned, drawn and brought into court in the manner provided by law; that more than twenty-four men were originally drawn and a venire originally issued for more than twenty-four men; and under the statute the court is without authority to issue a venire for more than twenty-four men.

The COURT: The statute specifically states that it may be done.

Mr. FIELD: I do not expect your Honor to sustain this motion, or any part of it. I am preserving my record.

The COURT: Proceed.

Mr. FIELD: All I want is the privilege which I believe belongs to me as a member of this bar, to make a record of the case about to be tried.

The COURT: I supposed you might not be aware of the
96 specific nature of the statute.

Mr. FIELD: That the court previously excused one member of the panel, a colored gentleman, I think his name was Bryan, telling him that he was subject to call at any time, and excused Mr. Goetz without any sufficient reason or excuse on his part as to why he should not serve, and because in the method of selection or of bringing into court and empaneling this jury, the provisions of the statute have been set aside and abated.

The COURT: I suppose it may be desired to have the facts appear with reference to that: I suppose they can be put in.

Mr. WOOD: So far as the record of this case is concerned, we think they have no proper place therein; we suggest that the court do not make it a part of the record.

The COURT: Mr. Field suggests that there are some facts—by suggestion—I do not think they are facts.

Mr. WOOD: We are willing to let it go at that, as far as they make facts.

Mr. FIELD: Do I understand the court to overrule the challenge?

The COURT: Yes.

Mr. FIELD: The defendant excepts.

97 Thereupon, the trial of this cause proceeds.

A jury was thereupon called into the jury box, and the empanelment thereof proceeded with:

The hour of twelve o'clock having arrived, a recess was taken until 2 o'clock p. m., when the empanelment of the jury was proceeded with.

And at the hour of 4:10 o'clock p. m., the jury was duly empaneled, and sworn to try the cause; the proceedings relating thereto being here omitted by direction of counsel for the defendants.

Mr. MANN: On behalf of the defendant Weinman, counsel requests that the jury during the trial of this cause be kept together, and not allowed to separate:

The COURT: Which request is denied.

Mr. MANN: To which ruling the defendant Weinman excepts.

Thereupon Mr. Marron made an opening statement of the plaintiffs' case to the jury.

A-ter discussion as to the order of proof:

NEILL B. FIELD introduced as a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct examination by Mr. WOOD:

Q. You are one of the attorneys for the defendants in this case, are you not?

A. I am sole attorney—attorney of record for Mr. Barnett,
98 in this cause.

Q. And you have been his attorney since this cause was instituted, have you not?

A. I have.

Q. You were present at the former trials of this cause and assisted in them?

A. I did.

Q. This is the fourth trial of this cause, is it not?

A. I think so.

Q. Mr. Field, do you recollect that, upon the first trial of this cause, a lease between the defendant Weinman and the plaintiffs was produced and introduced in evidence?

Mr. FIELD, on behalf of defendant Barnett: I object to that question because the record of the proceedings of the first trial of this cause is preserved in a bill of exceptions, and the bill of exceptions is the best evidence of what transpired on that trial.

Mr. MANN: I join in that objection on behalf of the defendant Barnett.

Mr. WOOD: I do not care to argue that proposition unless your Honor wishes to hear me.

The COURT: I suppose the bill of exceptions is a part of the record of the court.

Mr. WOOD: That may possibly be, but it certainly is not the best evidence as to what was produced at the time, if counsel was there, and knows; there is no better evidence than that.

99 Mr. MANN: It seems to me that the record of the court is better evidence than the witness' memory.

COURT: If it is in the record—I do not know whether it is—I do not know of any such bill of exceptions—there is no proof of any here at present.

Mr. WOOD: The bill of exceptions I had in mind—there was a bill of exceptions presented during the trial—referred to in the former trial, and when I spoke to your Honor I had in mind that bill of exceptions.

Mr. FIELD: I have here what purports to be a printed copy of the record of the first trial of this case, which was, that there was a bill of exceptions, and of course that bill of exceptions should be a part of the record of the court; there is no way that it could properly get away.

COURT: That is the first trial.

Mr. FIELD: I understood the question of counsel to be as to the first trial.

COURT: If that lease is part of the record of the court, that is the best evidence of it.

Mr. WOOD: Of whether it was here produced—the original. If the bill of exceptions says so, Mr. Field has it right here, I suppose it must be that it does say so.

100 Mr. FIELD: I assume that the bill of exceptions says what transpired at the first trial, and that is the way to prove it and not by oral testimony of counsel.

COURT: The bill of exceptions may not include everything. If it does not show that, I think he could prove it in another way.

Mr. WOOD: My question does not involve whether it was introduced in evidence. I asked him whether such a lease was produced here: I will change my question.

COURT: He must have the record close at hand, and you better look at it.

Mr. FIELD: This is not the official record I have here, it is a record from my office and is part of the private files of my office: it purports to be a printed copy of the transcript used in the Supreme Court.

Mr. WOOD: I will withdraw the question.

Q You were present conducting the case, upon the second trial, for and on behalf of your client, weren't you, Mr. Field?

A. I was present during the progress of that trial up to the time when I made an argument on behalf of my client, and then left and was not present during the balance of the trial—that is, the argument to the jury.

Q. During the time that you were present here in the court
101 room, upon the second trial, did you see a lease made by Jacob Weinman and R. Di Palma and Bernard Ruppe, for the premises that were occupied by the plaintiffs at the time of the falling of the building in question in this suit?

Mr. MANN: This is objected to as leading, on behalf of defendant Weinman, and as incompetent, irrelevant and immaterial, and for the further reason that the lease itself would be the best evidence or record of the trial—of that trial.

COURT: I understand that you are trying to prove the loss of the lease.

Mr. FIELD: I wish to object to it on the ground that it calls upon the witness to construe a written instrument and to state his construction of the contents of it.

COURT: I think it does, in the form it is. Objection sustained.

Q. I show you, Mr. Field, a bill of exceptions from the files of this office. Do you recognize that document which I show you?

Mr. FIELD: I object to that question on behalf of defendant Barnett, because I am not the custodian of this record, and not competent to testify to its identity; we object to it, and the record shows for itself what it is.

Q. My question is, do you recognize the instrument shown
102 you?

Mr. WOOD: I intend to follow that up by showing that that was made in his office, and that he had in his office every document referred to in it.

Mr. MANN: We object, on the ground that it is immaterial whether it is a record of this court or not.

COURT: He is not trying to prove it.

Mr. MANN: Then it is immaterial.

COURT: Objection overruled.

MANN: Exception.

It is here stated that when exceptions are noted by counsel for the defendants, they shall be considered as an exception by each defendant, except where specifically stated to the contrary.

A. Yes, sir, I do.

Q. Who prepared that document for filing, if you know?

Mr. MANN: Objected to on behalf of defendant Weinman, as incompetent, irrelevant and immaterial; it being the record of this court, it is immaterial who prepared it for filing and what it contains.

COURT: Overruled.

Mr. MANN: Exception.

A. The document was prepared as a bill of exceptions, in my office under my direction and by clerks or stenographers em-
103 ployed by me, for that purpose; part of the document appears to have been the work of the court stenographer—I am not sure that that is so, but it so appears to me, that part of it was done in my office, by my clerks.

Q. Will you examine that bill of exceptions and see if you can find in it what purports to be a copy of a lease between Jacob Weinman and R. Di Palma and Bernard Ruppe?

COURT: What page?

Q. To assist you, on printed page, it is page 79.

Mr. MANN: I desire to object on behalf of defendant Weinman, to any testimony in this case, for the reason that the complaint in this case does not state facts sufficient to constitute a cause of action, the complaint showing that Mr. Ruppe and Mr. Weinman were interested together in the freehold, and there being no allegation showing, or tending to show, the interest of either of the plaintiffs in the stock of drugs, fixtures and merchandise alleged to have been destroyed.

COURT: You said Weinman—I suppose you meant Di Palma.

Mr. MANN: Yes, Di Palma.

COURT: Overruled.

Mr. MANN: Exception.

104 A. (Witness examining document referred to by counsel.) I now find such paper.

Q. Did you ever see the original of that paper?

Mr. MANN: I object to that, as incompetent, irrelevant and immaterial.

COURT: Overruled.

Mr. MANN: Exception.

A. I have no doubt I did: I have never compared the original with this copy, but I have no doubt I saw the original paper, of which this is a copy.

Q. Where did you last see it?

A. I have not any present recollection of where I last saw it, but

I have absolutely no doubt that it was in my office, when this bill of exceptions was prepared.

Mr. MANN: I move to strike out the answer, as being merely the opinion of the witness, and not stating any fact: I do not care whether he doubts it or not.

A. (Cont.) I suppose I have a right to answer the question.

The COURT: Finish the answer.

A. (Cont.) This bill of exceptions purports to have been signed by the judge of this court, on the 9th day of April, 1907, and to have been filed in the clerk's office on that day, and I have no doubt that at or about that time, I had that paper in my possession in my office.

105 Mr. MANN: I move to strike out all the answer of the witness as to what he had no doubt of: he does not state it as an affirmative fact, and I object to it on behalf of Mr. Weinman.

COURT: I will overrule the objection: I take it to be merely another way of stating that that is the best of his recollection.

Mr. FIELD: On behalf of Mr. Barnett, I wish to say that I have stated that I have now no present recollection of having seen this paper at that time, but having seen this bill of exceptions and refreshed my recollection from it, I have no doubt that I had that paper in my possession at, or about that time.

Mr. MANN: I move to strike that out, for the reason as given above.

Mr. FIELD: That was not testimony on my part.

Mr. MANN: Then I will withdraw my objection to that part of it.

Q. Now Mr. Field, what did you do with the original of that lease, as you say you have no doubt it was in your office when that bill of exceptions was made up?

Mr. MANN: I object to this, as incompetent, irrelevant and immaterial, and not calling for any fact within the knowledge of the witness.

106 COURT: Overruled.

Mr. MANN: Exception.

A. I have no present recollection of what was done with the paper; I can tell you what I think I did with it, if you want to know.

Mr. MANN: I object to the witness stating what he thinks.

Mr. WOOD: I do not care for what he thinks he did, if he does not know what he did with it.

Q. Did you have at that time, Mr. Field—what is your recollection as to whether or not you had, at that time, in your office all of the exhibits that were used upon the second trial of this case when you prepared the bill of exceptions which I have shown to you?

A. I am quite certain that I had in my office, at that time, all of the exhibits which it was necessary for me to have in order to prepare this bill of exceptions.

Q. And you got them from the clerk's office of this court, did you not?

A. I think it very unlikely that I did, personally. I have no recollection of that. They were undoubtedly obtained from the clerk's office by some representative or employee of mine.

Q. When or where have you ever seen those documents, or any of them, since the time you prepared, or had prepared, that bill of exceptions?

A. I have a distinct recollection of having seen one of those exhibits at the time the bill of exceptions was signed—I saw
107 some of the others at the last trial of the case here, and I think I saw some of them at the Supreme Court when the case was under review there, I am almost, but not positively, certain that I did see them in the custody of the clerk of the Supreme Court, but I think I did.

The hour of 5 p. m. having arrived, the court adjourned until 9:30 o'clock tomorrow morning, March 31st, 1910.

And now on this March 31st, 1910, pursuant to adjourning, the trial of this cause proceeds.

Mr. NEILL B. FIELD resumed the witness stand.

Direct examination (Cont.):

Q. Mr. Field, you caused the bill of exceptions of the second trial to be printed for use of the court of appeal, did you not?

A. Yes, sir.

Q. And for convenience of reference, I will call your attention to page 79 of the printed transcript, purporting to be the lease of the property from Weinman to Di Palma and Ruppe: I think you stated that you had no doubt that the original of that was in your office when you made up the bill of exceptions, did you not?

Mr. MANN: I object to this for the further reason that the fact that Mr. Field had no doubt, is not proof and does not tend to prove the fact itself.

COURT: If he has stated so, it is already in the record.

108 Mr. MANN: Exception.

COURT: I sustained your objection; it does not have to be repeated.

Q. What is your recollection as to when you last saw the original of that document?

A. Why, it is impossible for me to say that I have any present recollection of having seen the document, except at some time when I saw it in the course of the trial; and from the fact I put it in this bill of exceptions—I know I had it in my possession.

Mr. MANN: I object to the witness testifying to something he knows from other facts.

Mr. FIELD: On behalf of Mr. Barnett, and myself as a witness, I do not think Judge Mann's objection can keep me from telling the truth, as I understand it. I have told what I know in answer to the questions. I cannot answer the question, yes or no, and I cannot say

when I last saw—my present recollection of when I saw this paper, without saying what I said and saying further, that, from the same facts, I know I returned it to the clerk's office.

Mr. MANN: I will withdraw the objection, in view of the last part of the statement.

Q. Now, Mr. Field, how do you know——

A. (Cont.) I want to add to the answer—from the same facts, I am satisfied that I returned it to the clerk's office.

109 Q. The time when you say you knew you had it in your office, when was that, Mr. Field?

COURT: It seems to me, Mr. Wood, you are losing sight, for some reason, of the purpose with which you started out; that is the legitimate purpose which you announced—when he says that he has passed those papers from his possession in the clerk's office, why do you want to follow him further? If he put it back to the clerk you have to put on the clerk as the last one who had it.

Mr. WOOD: I think your Honor misunderstands my question; I am simply asking Mr. Field to state when it was, in reference to these trials, that he had——

COURT: What difference does it make?

Mr. WOOD: I want to show that the original was here on the second trial, and that it was immediately after the second trial when he made up this, and after the time when it was in his office.

COURT: What difference does it make if he says it was in his office—you might probably ask him if he searched for it—he says he some time had the paper, and says he is satisfied that he gave it to the clerk.

Mr. WOOD: He did not say that, I think.

COURT: I do not see why you should chase Mr. Field all around the bush about this matter—I do not see why the court should

110 sit here for a game of that kind.

Mr. WOOD: I object to your Honor's criticism of the examination as a game, and I assert it is nothing of the sort.

COURT: It certainly has appeared somewhat that way. It seems to me, since you are entirely losing track of that which would enable you to get in this copy. That is what you announced you expected to do, and on that ground, I allowed you to proceed.

Mr. WOOD: We respectfully except to the remarks of the court and his criticism of the examination by counsel, as tending to prejudice the jury, and not borne out by anything which transpired. I have acted conscientiously; and anticipating the clerk, that he never got those papers back, I desire to ask Mr. Field, if the court will permit me one or two further questions, on his recollection or his certainty as to whether or not the papers were returned.

COURT: All the clerk would say, I suppose, is that he cannot find the papers where he would naturally look for them.

Mr. WOOD: Your Honor declines to allow me to ask that question?

COURT: In anticipation; after the clerk has so testified I will allow you.

111 Mr. WOOD: To put Mr. Field back and go over it again?
COURT: If it is necessary.
Mr. WOOD: We except to the refusal of the court at this time to permit us.
Mr. FIELD: I wish the record to show that the defendant Barnett does not object to counsel asking this witness any questions he wishes to ask.
COURT: I think the court has a duty in the matter.
Mr. FIELD: As a lawyer, I think it is scarcely fair to me to leave this testimony in the shape where the jury might be authorized to infer that I have concealed this from them, or that I have failed to make every effort which might be made to assist in producing them.
COURT: You already testified that you were satisfied you gave them back to the clerk, and if Mr. Wood wants to ask if you searched for them or what you have done to try to find them, he is certainly at liberty to do so; but this is not a trial of a case for the disposition of these papers—it is a question to be determined whether or not a copy of this lease can be admitted in evidence here, and that is the only question that is legitimately under discussion.
Mr. WOOD: That is certainly the only object that I have
112 had, or still have.
COURT: It seemed to me to be different.

Q. I call your attention, Mr. Field, to a document which was on pages 75, '6 and '7 of this printed transcript; I will ask you whether or not that is one of the documents which it is your recollection you had in your office at the time you stated.
A. I make the same statement with reference to that document.
COURT: What is that?
A. That purports to be a deed from Goldstein to Weinman—I would say that is not a copy, because the name of the grantee is J. H. Weinman, and I am very sure that the name in the printed deed is J. A. Weinman—that is a printer's mistake.
Q. With the exception of the letter H, which you state you think a printer's error, is the rest of the instrument, to your recollection, a copy of the original which you had in your office.

Mr. MANN: I object to that for the evident reason that the witness could not remember.
COURT: Sustained.

Q. What is your recollection as to whether or not you had an original of that paper, in substance, in your office at the time?

Mr. MANN: Objected to for the same reason. It seems to me that it is evident that no one could remember whether a deed over
113 a couple of pages, is a true copy, with the exception of one or two letters, of the original deed. The deed must be of record, and if it is it seems to me that the record would be the best evidence, if the original cannot be produced.
Mr. FIELD: On behalf of Mr. Barnett I wish to make objection in reference to this deed, that the record is primary evidence of its con-

tents, when it is shown that the deed is not in the possession of the person desiring to use the same.

Mr. WOOD: I am not offering the deed in evidence; I am merely trying to show the loss.

COURT: You object to the question?

Mr. FIELD: It is unnecessary to show the loss: all that is necessary to do is to show that the original is not in the possession of the party desiring to use it; that is the objection I make on behalf of the defendant Barnett to this question.

The COURT: Objection sustained.

Mr. WOOD: Exception: and we offer to show by the witness that the original of the paper referred to was in his office after the second trial and has not thereafter been found.

Q. I call your attention, Mr. Field, to a document which appears on pages 64 to 68—the specifications—in the printed transcript: I ask you whether or not that is a copy—whether or not it is
114 your recollection that you had the original of that in your office after the second trial.

Mr. MANN: Objected to by the defendant Weinman on the ground that the witness cannot testify that that is a copy of the original, or that the original was the same as the printed copy. He might state whether or not he had an instrument purporting to be plans and specifications.

The COURT: Do you want to change the form, Mr. Wood, of your question—if he had the original, or of that which purports to be a copy?

Mr. WOOD: That is satisfactory to me.

A. I have the same recollection with reference to that instrument that I have as to the others; neither more nor less.

Q. And do you make the same answer in regard to the paper which appears on pages 70 and 71 of the printed record? That is, the contract between La Driere, superintendent, and Grande.

Mr. MANN: I presume counsel means by his question, if that contract was not here at the last trial.

Mr. WOOD: I think not: my present indistinct recollection is, that that contract was here at the last trial.

A. That is my present recollection, that that contract was here at the last trial.

Q. Mr. Field, I will show you the printed clippings from one of those original printed transcripts, and I will ask you, generally, whether it is your recollection that you had in your office
115 the originals of which those printed records purport to be copies, after the second trial; and for the purpose of making up the bill of exceptions.

A. (Witness examining clippings.) Yes sir.

Q. And have you any recollection of ever having seen all the originals of which these purport to be copies, since that time?

A. No sir, no present recollection of having seen them.

Q. Now, what is your recollection as to what you personally did

with these when they were in your office, if you have any recollection?

A. It is difficult for me to distinguish, in my answer to this question, between recollection and impression derived from my method of doing business, but I will answer the question as fully as I can, subject to what the counsel may see fit to suggest about it afterwards: my recollection is, that I required some representative or employee of mine to get these papers from the clerk's office; that they were brought to me, subjected to my inspection, and that I directed the manner and place of their insertion in the bill of exceptions, dictated the bill of exceptions and indicated in the dictation where each one of these papers was to go; that after the bill of exceptions was so made up and inspected by me, that I directed that the original papers be returned to the clerk's office, and that I have never seen them since. I have seen, and there was present at the last trial, a considerable number of those original papers; some were
116 missing at the last trial—but as to whatever was missing at the last trial, I have no recollection of ever having seen them since I used them in the way indicated; but I have, myself, searched and I have caused such search to be made in my office as enables me to say positively that the papers are not in my office in any place where they would likely, by any possibility, be placed, and I believe they were returned from my office to the clerk's office by some one of my employees or representatives.

Q. Now you stated, Mr. Field, that some of the papers, some of the exhibits you thought you saw at the last trial; did you see any of the papers at the last trial which are—purport to be copied in the document which you have just examined?

A. I am very sure there were none of those papers here at the last trial.

Mr. Wood: I ask to have the paper which the witness has identified marked, if your Honor considers, in view of the endorsement upon it, it is necessary; otherwise I will refer to the endorsement upon it.

The Court: I think that is sufficient.

Mr. Wood: The paper the witness has referred to is marked, copy of exhibits filed in my office this January 24th, 1909. John Venable, Clerk. That is all.

Thereupon the witness was excused.

Mr. Wood: While we are waiting for the clerk, I will ask that Mr. Marron and Mr. McMillen be sworn in regard to this
117 matter.

O. N. Marron, introduced as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. Wood:

Q. Are you one of the attorneys for the plaintiffs in this case?

A. I am.

Q. And have you been since the case was commenced?

A. Yes sir.

Q. I show you, Mr. Marron, the paper referred to by the last witness, marked copies of exhibits, etc.: will you tell us when and where you last saw the originals of which the papers there purport to be copies?

A. At the second trial of this cause.

Q. And what was done with them at the time of the second trial, if you know.

A. They were left with the stenographer, as exhibits of the testimony.

Mr. WOOD: That is all.

Mr. MANN: No questions.

A. B. MCMILLEN, introduced as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. WOOD:

Q. Are you one of the attorneys for the plaintiffs in this case?

118 A. Yes sir.

Q. And have you been since it was commenced?

A. I have.

Q. Have you been present, taking part in each of the trials of this cause?

A. Yes sir.

Q. I show you the document referred to in the testimony of the two preceding witnesses, marked copies of exhibits: will you tell us when and where you last saw the originals of which those originals purport to be copies?

A. I had those in my office at the time of introducing them in evidence at the second trial.

Q. Were they introduced and left in the record of the court at that time?

Mr. FIELD: I object that the record will show whether they were introduced.

The COURT: If they were left any place, the witness may state.

Mr. WOOD: I will change the question.

The COURT: You better change it.

Q. What was done with those originals at the time of the second trial.

A. They were left here in charge of the proper officer—the clerk of the court, and I have not seen them since that time.

Q. And do you know where they are?

A. I do not.

119 Mr. WOOD: That is all.

JOHN VENABLE, introduced as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. WOOD:

Q. Are you the clerk of this court?
A. I am.
Q. Were you the clerk of this court at the time of the second trial of this cause?
A. I think I was: I am not sure about that.
Mr. FIELD: The trial commenced on the 14th day of November, 1906.
A. I was clerk at that time.
Q. You were clerk on the 14th day of November, 1906?
A. Yes sir.
Q. And have you any recollection, Mr. Venable, as to receiving the exhibits that were introduced in evidence upon the trial of this cause that occurred at that time, the second trial of this cause?
A. No, I have not.
Q. Were you present at the third trial of this cause, that occurred on December last?
A. Yes sir.
Q. I show you a paper which has been referred to here, marked copy of exhibits, filed Dec. 24th, 1909; do you recollect that upon the occasion of the trial which occurred last December, that you
120 made a search of the files in your office for the originals of exhibits that are referred to in the paper that I have shown you?
A. Why, I made a search for the exhibits: I do not know of course, that these are the ones—I presume they are—it says copies——
Q. Tell us what search you made.
A. I searched through the files of the office, in the vault, and also in the room of disposed-of cases, which is downstairs, and in the vault used for that purpose upstairs.
Q. And were you able to find the originals of those exhibits?
A. Why, there were quite a number of the exhibits I did not find—I do not know just what ones.
Q. And all that you did find, did you produce here in court?
A. I did, yes sir.

Mr. WOOD: That is all.

Cross-examination by Mr. FIELD:

Q. There were quite a number of exhibits that you never did find, weren't there?
A. Yes sir.
Q. There was a large box of stuff that was rescued from the wreck and brought in here and used on the second trial, that disappeared, was there not?
A. I understand that has disappeared: I know nothing about that.
Q. But that was in the custody of the clerk's office, the same as the other exhibits, was it not?

121 A. No sir, I am sure that was never in the custody of the clerk at all—that box: the only exhibits that I have a distinct recollection of was that box of tooth brushes and so on, and that was in the custody of the sheriff all the time.

Q. You sent a lot of the exhibits of this cause to the clerk of the Supreme Court, by the direction of the court, with the record, did you not?

Mr. McMillen: We object to that for the reason that the record will not show that these particular exhibits were ordered sent, and it is, therefore, immaterial to this investigation; and also that the record is the best evidence of what the clerk was ordered to send.

Mr. Field: The record is not the best evidence of what the clerk sent.

The Court: I will sustain the objection.

Mr. Field: We except: and I offer to show by the witness, in answer to the question, that he did send to the clerk of the Supreme Court, with the transcript in the case, a number of exhibits which I will not take the time now to designate specifically, unless the court requires me to do it. I will ask leave to designate them later.

Mr. McMillan: We object to the offer to prove, for the reason that it does not appear that any of the lost exhibits were included in those sent to the Supreme Court.

122 The Court: The objection is sustained, but again it seems to me that the investigation is off the track. As I understood it, the matter started with an offer to prove a certain paper, a lease, by copy; now it seems to have wandered all over the field.

Mr. Field: I was not here at the time, but it was reported to me at the last trial, that an argument was made to this jury that the last time anybody had seen some of these exhibits, they were in my office, and the jury was asked to infer that I had suppressed the exhibits: it was reported to me that such an argument was made to the jury on the last trial.

The Court: I do not remember now as to that. This Court is not sitting now to determine any question of blame about these papers: it is simply to determine whether a copy is admissible.

Mr. Field: So far as I am concerned, I am not asking the court to do anything except to pass on the questions presented and give me an exception.

The Court: As I said before, the court has to take some direction of the course of the procedure here: I do not mean to have any such question come into the case, and if it should come in, obviously we should have to continue the case.

Mr. Field: I think that perhaps the members of the jury are entitled to some consideration at the hands of the court.

123 The Court: That is what I am trying to give: I am trying to keep the matter from going into a matter of investigation of the question of who is to blame: all that is legitimate here is to determine whether or not this copy is admissible.

Mr. Field: All of this is for the court, and the jury has nothing to do with it: it is no business of the jury what became of these exhibits, the question is one of law.

The COURT: No objection was made on that score: possibly I shall admit it as for the court entirely, but I have not been asked to; but I had supposed it would be a very brief matter to find out whether you had the paper or had made a search for it, and then it would go to somebody else, and so on.

Mr. MANN: No questions.

Thereupon the witness was excused.

Mr. WOOD: We offer in evidence a copy of a warranty deed, from the records of the Probate Court of Bernalillo County—we offer the record of the Probate Clerk's office of Bernalillo County, page 493, Book 32, which purports to be a copy of a deed of Joseph Goldstein to J. A. Weinman—which purports to be a record of a deed in that office.

Mr. FIELD: To which we object, not upon the ground that the record is not properly identified, but upon the ground that
124 the original deed, if here, would be incompetent, inadmissible, and the tendency of it would be to introduce a false issue before the jury, the question of title to the lot described in the deed not being involved in the case, the sole question being one of possession and invasion of possession.

The COURT: Of course the book has not been identified.

Mr. FIELD: We make that no ground of objection.

The COURT: I believe I admitted it heretofore.

Mr. FIELD: Yes, you did on the last trial.

The COURT: Objection overruled.

Mr. FIELD: We except.

Thereupon the document offered was referred to as Plaintiffs' Exhibit A, and which said exhibit is in words and figures following, to-wit:

(EXHIBIT A.)

"This Indenture, made this 30th day of December, in the year of our Lord, one thousand eight hundred and eighty-nine, between Joseph Goldstein, a single man, of Albuquerque, in the County of Bernalillo, Territory of New Mexico, of the first part, and J. A. Weinman of the same place, of the second part:

Witnesseth, that the said party of the first part for and in consideration of the sum of One Dollar, lawful money of the
125 United States to him in hand paid, by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has granted, bargained, sold, remised, conveyed, released and confirmed, and by these presents does grant, bargain, sell, remise, convey, release and confirm, unto the said party of the second part, his heirs and assigns forever all the following described lot or parcel of land and real estate, situate, lying and being in the county of Bernalillo and Territory of New Mexico:

Lot numbered two (2) in Block numbered sixteen (16) in the New Mexico Town Company Townsite in the City of Albuquerque, in the County of Bernalillo and Territory of New Mexico, as shown

on the map of the said New Mexico Town Co. Townsite, made by M. J. Mack, C. E., and filed in the office of the Probate Clerk and Ex-officio Recorder for said Bernalillo County, N. M., on the 29th day of December, A. D. 1882:

Subject, however, to an encumbrance of $4,000.00 secured by deed of trust on the within described premises.

Together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and all the estate, right, title, interest, claim and demand whatsoever of the said party of the first part, either in law or equity, of, in and to the above described premises, with the hereditaments and appurtenances:

To Have and to Hold, the said premises above bargained
126 and described with the appurtenances, unto the said party of the second part, his heirs and assigns forever.

And the said party of the first part for his heirs, executors and administrators does covenant and agree to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these premises he is well seized of the premises above conveyed, of a good, sure, perfect and indefeasible estate of inheritance, in law and in fee simple, and has good right, full power and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid, and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments and incumbrances of what kind and nature soever; and the above bargained premises in the quiet and peaceful possession of the party of the second part, his heirs and assigns, against all and every person and persons lawfully claiming or to claim the whole or any part thereof, the said party of the first — will warrant and forever defend.

In Witness Whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

JOSEPH GOLDSTEIN. [SEAL.]

Signed, sealed and delivered in the presence of
OTTO DIECKMANN.

TERRITORY OF NEW MEXICO,
County of Bernalillo, ss.:

On this 30th day of December, 1899, before me personally appeared Joseph Goldstein, a single man, to me known to be the
127 person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

Witness my hand and seal the day and year last above written.

OTTO DIECKMAN.
[NOTARIAL SEAL.] *Notary Public.*

My commission expires November 23, 1902.

(500 cents inter revenue stamp. J. G. 12-30-99.)

TERRITORY OF NEW MEXICO,
County of Bernalillo, ss.:

I hereby certify that this instrument was filed for record on the 4th day of January, A. D. 1900, at 2:30 p. m. and recorded January 6th, A. D. 1900.

J. A. SUMMERS,
Probate Clerk and Recorder."

Mr. WOOD: We offer in evidence from the original bill of exceptions of the second trial that has been referred to, a copy of the lease therein mentioned from Jacob Weinman to Ruppe and Di Palma.

Mr. FIELD: To which we object, upon the ground that the original lease if present, would not be admissible for any purpose, because this is not a suit founded upon any right growing out of contract, but is an action of tort, where the sole question is whether or not the plaintiff was in possession of the premises at the time of the alleged trespass; the question of title not being involved, and it tends to introduce a false issue before the jury.

128 Mr. MANN: On behalf of defendant Weinman, I make the further objection that it is incompetent, irrelevant and immaterial in the present case, for the reason that it is not shown in the complaint that either of the plaintiffs had such an interest in the stock of goods alleged to have been destroyed to entitle them to recover, and that no proper foundation has been laid for the introduction of the secondary evidence.

Mr. FIELD: I join in that objection also.

The COURT: Of a copy?

Mr. FIELD: Yes, sir.

The COURT: I will overrule the objections.

Mr. FIELD: We except.

Thereupon the instrument was referred to as Plaintiffs' Exhibit B, and which said Exhibit is in words and figures following, to-wit:

(EXHIBIT B.)

This Indenture, made this ninth day of November, in the year of our Lord, one thousand nine hundred and one, between Jacob A. Weinman of Albuquerque, New Mexico, Bernalillo County, party of the first part, and R. Di Palma and B. Ruppe, Mgr., of same place, parties of the second part:

129 Witnesseth, that the said party of the first part for and in consideration of the covenants and agreements hereinafter mentioned, to be kept and performed by the said parties of the second part, there heirs, executors and administrators, has demised and leased to said parties of the second part, all the premises, situate, lying and being in Albuquerque in the County of Bernalillo and Teritory of New Mexico, known and described as follows, to-wit: Lot (No. 2) two, in Block (No. 16) sixteen, of the original town-

site of the New Mexico Town Company as known and designated on the map and plat of said townsite on file in the office of the probate clerk and ex-officio recorder of said Bernalillo County, New Mexico.

To Have and To Hold, the above described premises with the appurtenances unto the said parties of the second part, their heirs, executors, administrators and assigns, from the fifteenth day of December, in the year of our Lord one thousand nine hundred and one for and during, and until the fifteenth day of December in the year of our Lord one thousand nine hundred and three.

And the said parties of the second part, in consideration of the lease of the premises aforesaid by the said party of the first part to —— the said parties of the second part to covenant and agree with the said party of the first part, his heirs, executors, administrators and assigns, to pay the said party of the first part as rent for the said demised premises, the sum of Ten hundred and eighty dollars in monthly installments of ninety dollars each, payable in advance, on the first day of each and every month during said
130 two (2) years, beginning on December 15th, 1901, one thousand nine hundred and one.

And the said parties of the second part further covenant with the said party of the first part, that the second parties have received said demised premises in good order and condition, and at the expiration of the time of the lease mentioned they will yield up the said premises to the said party of the first part in as good order and condition as when the same was entered upon by the said parties of the second part, loss by fire or inevitable accident, or ordinary wear excepted; and also will keep said premises in good repair during the lease at their own expense.

And it is further agreed by the said parties of the second part that neither they nor their legal representatives will underlet said premises or assign this lease without the written assent of the said party of the first part had and obtained thereto, and that they will not use nor permit the said premises to be used for any purpose prohibited by the laws of the United States or New Mexico.

And it is expressly understood and agreed, by and between the parties aforesaid that, if the rent above reserved or any part thereof, shall be behind or unpaid on the day of payment whereon the same ought to be paid as aforesaid, or if default shall be made in any of the covenants or agreements herein contained to be kept by the said parties of the second part, their heirs, executors and administrators, it shall and may be lawful for the party of the first part, his heirs, executors, administrators, agent, attorney or assigns,
131 at their election, to declare said term ended, and into the said premises or any part thereof, either with or without process of law, to reenter, and the said party of the second part, or any other person or persons occupying, in or upon the same, to expel, remove and put out, using such force as may be necessary in so doing, and the said premises again to repossess and enjoy as in their first and former estate, and to distrain for any rent that may be due thereon, upon any property belonging to the said parties of the

second part, whether the same be exempt from execution and distress by law or not, and the said party of the second part, in that case hereby waives all legal rights which they now have or may have, to hold or retain any such property under any exemption laws now in force in the Territory or in any other way, meaning and intending hereby to give the said party of the first part, his heirs, executors, administrators or assigns a valid and first lien upon any and all goods, chattels and other property belonging to the said parties of the said second part as security for the payment of said rent in manner aforesaid, anything hereinbefore mentioned to the contrary notwithstanding. And if at any time said term shall be ended at such election of said party of the first part, his heirs, executors, administrators and assigns, as aforesaid, or in any other way, the said parties of the second part their heirs and administrators, do hereby covenant and agree to surrender and deliver up said above described premises and property peaceably to said party of the first
132 part, his heirs, executors, administrators and assigns, immediately upon the termination of said term as aforesaid, and if they shall remain in possession of the same — days after notice of such default or after the termination of the lease in any of the ways above named they shall be deemed guilty of a forcible detainer of said premises under the statute and shall be subject to all the conditions and provisions above named, and to eviction and removal, forcible or otherwise, with or without process of law as above stated. And it is further covenanted and agreed by and between the parties, that the parties of the second part shall pay and discharge all costs and attorneys fees and expenses that shall arise from enforcing the covenants of this indenture by the party of the first part.

And it is further covenanted and agreed between the parties aforesaid: The covenants herein shall extend to and be binding upon the heirs, executors and administrators of the parties to this lease.

Witness the hands and seals of said parties aforesaid, the day and year first above written.

Witness.

JACOB WEINMAN. [SEAL.]
R. DI PALMA. [SEAL.]
B. RUPPE, *Mgr.* [SEAL.]

PITT ROSS, introduced as a witness on behalf of the plaintiffs, being first duly sworn testified as follows:

133 Direct examination by Mr. WOOD:

Q. State your name, residence and occupation?

A. Pitt Ross, Albuquerque, surveyor and civil engineer.

Q. How long have you been a surveyor and civil engineer and pursuing that profession?

A. About twenty-five years.

Q. What offices, if any, in connection with your profession, have you held in this city?

Mr. FIELD: I object to that as wholly immaterial.

Mr. WOOD: It is merely as to his qualification.

The COURT: Objection sustained.

Q. Are you familiar with the location of lots one and two, in block 16, original townsite of the city of Albuquerque?

A. I am.

Q. And where are they located with reference to the streets of the city?

A. At the southwest corner of Second street and Central Ave.

Q. And which one is nearest to Second street—which lot, one or two?

A. Lot one is the corner.

Q. And lot two is located directly west of lot one, is it not, facing on Central Ave.?

A. It is.

Q. And what building or buildings at present occupy the lots?

A. The Barnett building occupies both lots.

Q. That is the one occupied by Matson's Book Store and
134 the O'Rielly Drug Store?

A. It is occupied by the Ideal Shoe Store, the Postal Telegraph and the O'Rielly Drug Store, at present.

Q. I show you a plat of the situation there: will you tell us whether or not lots one and two, as indicated on that plat, correctly represent their relative position as to surrounding objects shown on that plat?

A. (Witness examining plat.) They do.

Mr. WOOD: We offer this in evidence as a plat showing the location of the lots in question in reference to the surrounding objects.

Mr. FIELD: Is this plat drawn to scale?

Mr. WOOD: I do not know anything about that: I did not make the plat: it purports merely to show the location for reference purposes.

Mr. FIELD: If it does not purport to show correctly the relative locations, but is a mere diagram showing the relative positions, I do not object to it.

Mr. WOOD: That is all that is claimed for it.

The COURT: It appears on the record that such is the claim only.

Mr. FIELD: I have no objection to it, under that state of fact.

Thereupon said plat was marked plaintiffs' exhibit C,
135 and which said exhibit is ordered to be sent to the clerk of the Supreme Court.

Q. Do you know the dimensions of lots one and two, Mr. Ross, in block 16?

A. I do.

Q. What are those dimensions?

A They are each twenty-five feet in width east and west by one hundred and forty-two feet in depth north and south.

Q. Do you remember the condition of those lots prior to the fall of the building on lot two—in June, 1902?

A. I do.

Q. And how were the lots occupied prior to that time?

A. The corner lot was occupied——

Mr. MANN: I object to this on behalf of defendant Weinman, for the reason that it has not been shown that the plaintiffs representing Di Palma have entered into possession, under the lease alleged to have been made.

The COURT: That would be a question of order of proof.

Mr. WOOD: I am putting Mr. Ross on at this time, for the reason that he has an urgent engagement in Socorro County, and I want to let him go and get through with that engagement, out of the order followed in the former trials of this case.

The COURT: I will overrule the objection, with the expectation that the connection will be made in the testimony in the
136 course of the trial.

Mr. MANN: We except.

A. The corner lot number one was occupied for many years by a one-story adobe building, which extended south from Railroad Ave. about two-thirds of the distance, the balance of the lot, or the rear portion was occupied by a brick structure; lott number two was occupied also by an adobe structure of about the same depth as the adobe building on lot number one.

Q. At the time in June—at the time of the falling of the wall upon the building on lot number two, what was the condition of lot number one, as to buildings, etc., upon it?

A. The adobe building on lot number one had been entirely removed, except for some debris, stone and scattered adobes, and I think the brick structure was pretty nearly completed, that is, the removal of it.

Q. And how was the building on lot number two occupied?

Mr. FIELD: I object to that question if it calls for who was the tenant of the building on lot number two.

The COURT: It did not really call for that, it asked him how it was occupied.

Mr. FIELD: It is simply out of abundance of caution that I make the objection.

The COURT: The witness need not say by whom; the ques-
137 tion was, how it was occupied.

A. It was occupied by a drug store.

Q. Now do you know who was there on the ground, in that drug store?

A. Do you want me to state it at any particular time, or does this cover——

Q. At, and for some time prior to, the fall of the wall.

The COURT: Answer yes or no.

A. I do.

Q. Who was it?

Mr. MANN: Objected to as incompetent, irrelevant and immaterial who was there.

The COURT: Overruled.

Mr. MANN: Exception.

A. Mr. Ruppe had been occupying it for some time.

Q. Did you survey lot- one and two, or did you make a survey for the purpose of finding the line between them prior to the falling of the wall on lot two?

A. I did.

Q. And when did you make that survey?

A. Mr. La Driere, the architect, called upon me, as city engineer at that time——

Mr. MANN: I move to strike that out as not responsive to the question.

138 Mr. WOOD: I will follow that up by another question, at present the question was limited as to when Mr. Ross made the survey.

A. (cont.). Well, it was a month I think, or more, prior to the fall of the wall—it was in the spring of 1902 that I made the first survey.

Q. And at whose request or by whose direction did you make it.

A. Mr. La Driere, as architect, ordered me to make the survey.

Mr. MANN: We object to that as immaterial.

A. (cont.). And I certified the bill to Mr. Joseph Barnett.

Mr. MANN: I move to strike that answer out, as not responsive; and I would like to have had a ruling on the objection.

Mr. FIELD: It might facilitate matters and save time, if the Court will suggest to the witness to answer the suggestions propounded.

The COURT: He was asked who employed him, or to that effect, and he gave the facts, which perhaps would leave it as a matter of inference who did employ him.

Mr. MANN: There was an objection to it as immaterial.

The COURT: Yes, and there was an objection back of that; I will overrule the objection.

139 Mr. MANN: Exception.

Q. Did you say you made the bill to Mr. Barnett: did he pay the bill?

Mr. FIELD: Objected to as wholly immaterial and tending to introduce a false issue before the jury.

Mr. MANN: And as leading.

The COURT: Overruled.

Mr. MANN: We except.

Mr. FIELD: We except.

A. He did.

Q. And what, if anything, did Mr. La Driere tell you as to the purpose for which the survey was being made?

Mr. WOOD: And in that connection, I will state to the Court that we expect to show by subsequent witnesses that Mr. La Driere was the architect employed by Barnett for the purpose of planning and erecting a building on the lot in question.

Mr. MANN: I object to it on behalf of defendant Weinman, as incompetent, irrelevant and immaterial, there being no claim that

he was represented by Mr. La Driere in any way, shape or form, and anything that La Driere may have said cannot be used as evidence in this case.

Mr. FIELD: On behalf of defendant Barnett, the objection
140 is that it was a perfectly lawful thing for Mr. Barnett to employ a surveyor to make a survey of his lot, and that the evidence that he did so is not competent in this case, and merely tends to confuse the issues which the jury are called upon to try.

The COURT: What bearing do you expect it will have on the case, Mr. Wood?

—— ——: I expect to show by the witness, that he was locating the line between the two lots, at the direction of Barnett, for the purpose of determining the point—or the exact location of the walls between the buildings, excavation for which was afterwards made and which, it was alleged by the plaintiffs, caused the fall of the building.

Mr. MANN: If he made the survey, I do not see how it can be material who he made it for.

The COURT: Overruled.

Mr. MANN: Exception.

Mr. FIELD: Exception.

A. To give him the definite boundaries of the lot and street grade and so on.

Q. Now, with reference to the east wall of the building occupied by Mr. Ruppe as a drug store as you have testified, at the sidewalk line on Railroad avenue, where was the line as you found it between lots one and two?

141 Mr. FIELD: To which we object as wholly irrelevant and immaterial, the question here being not what was the true line between lots one and two, but what part of lot number two was lawfully in the possession of the plaintiffs at the time of the alleged trespass.

The COURT: Overruled.

Mr. FIELD: Exception.

Mr. MANN: I object to the question on the ground that the witness has not testified that it was occupied by Mr. Ruppe, nor was he permitted to so testify, but testified that Ruppe was there managing, or had charge of the business.

The COURT: Overruled.

Mr. MANN: Exception.

A. The division line was about two and one-half inches, as near as I can remember, east of the east line of the wall of the Ruppe building.

Q. And what was the location of the line at the south end of the lots with reference to the same building?

A. It was, as near as could be determined by that survey, exactly on the line; that is, they did not extend to the rear of the lot, but the line projected through would be a line between the two walls as they stood. There was no conflict there. That is, the two walls, or

the walls of each building, stood together on the property line
142 at the rear end of the building.

Q. Was any part of the wall of the old building, or the building upon lot one then standing?

A. A little at the rear and near the south end; the workmen were still engaged in tearing that down. That is, it was nearly all removed, but they were at work while I was doing this—they were doing work on the south end of the wall, and the west wall of the brick building was still standing.

Q. Now, if I understand you, at the rear of the building on lot two, the walls of that building projected to almost the point of touching the walls that remained on the building of lot one?

Mr. FIELD: Objected to as leading and suggestive.

The COURT: Sustained: he has testified to that.

Mr. WOOD: He didn't make it entirely clear.

Q. How is it as to whether or not the walls of the two buildings at the point of the rear building on lot two, touched each other, as you saw at the time?

A. Well, to this extent: the brick wall was standing, and enough of what would be the south end of the adobe wall, which was on lot one, so that I could not produce the line through from the street to the alley—the line of sight was obstructed—they came together to that extent.

Q. Now, at that time did you make a map or did you indicate or mark the line as you found it upon the ground, and if so,
143 how?

A. I did: I marked the lines of the two streets and the lines—the west line of lot one on Railroad avenue by a—chiseling a cross at each point on the cement sidewalk, and by a stake at the alley, between lots one and two.

Q. Did you report the result of your work to any person?

A. Well, I will say, to Mr. La Driere I did and showed him the marks which I have stated.

Q. Now, do you recollect the time when the walls of the adobe—of the building on lot two fell?

A. I do.

Q. And at that time and just prior to the falling of those walls tell what was the condition of lot one.

A. Lot one was pretty nearly cleared and the excavations for the cellar more than half or perhaps two-thirds done, and the walls trimmed and workmen engaged in making excavations for piers on the west line of lot one.

Q. To what extent was the excavation on lot one made at that time, at the point on that lot nearest to Central avenue?

A. It had all been completed except the point last mentioned.

Q. And to what depth had it been excavated, if you know, with reference to the sidewalk surface?

A. Well, I think it was something over seven feet from the sidewalk as I stood there.

Q. How near did that excavation approach to the walls of the

building on lot two, at the point nearest the sidewalk—nearest Central avenue?

144 A. There was an excavation at the northwest corner of lot one probably extending south five feet or more, and enough under the sidewalk to provide for the usual footing, and this excavation slanted downward under the wall on lot two.

Q. To what extent, Mr. Ross, did it extend under the wall of the building on lot two that you have mentioned?

A. I think about a foot.

Q. And this particular excavation that you say extended under the wall, how deep was that below the surface of the sidewalk?

A. Well, at that time, the men stood in the pit, and their heads were more than a foot below the sidewalk, so that I think the excavation was seven feet or more in depth; that is, the bottom of the excavation was that far below the street grade.

Q. What time was that you have just referred to?

A. That was half past one or two o'clock—before two in the afternoon that the building fell.

Q. How many men were working in that corner where the excavation was under the walls of the building on lot two at that time, and what were they doing?

A. There were three men engaged there; two, I think, in this excavation proper and one just opposite them as though getting material for them, I did not notice closely just what he was doing; and they were very busily engaged the few minutes that I was there—each had tools in their hands at work.

Q. Well, what tools?

145 A. One had a spade—I am not sure whether the other had a spade or a pick.

Q. Did you notice the condition of sides of this excavation at the time?

A. I could not see the north side, as that was a trifle under the sidewalk where I stood. The south and west sides were pretty well trimmed up by the spades.

Q. Were they apparently in a finished condition?

Mr. FIELD: We object to that as leading and suggestive.

The COURT: Sustained.

Q. Can you describe them any more fully as to their condition than you have done, if so, do so.

A. Well, there was a little loose dirt still in the bottom of the pit, that I think one of the men had just been throwing out from—that is, one side—and as I am saying that I am not certain whether the other man had a pick and was picking out the rest of it or not—they weren't very busy at that time—as though they were kind of half resting.

Q. Now, you say that this excavation that you have last described was about five feet in length, extending under the wall of the building on lot two; from that point where this excavation ended, running back along the wall of lot two, what was the condition of the excavation or the dirt there next to the wall?

A. Well, there was a bank of earth two or three feet in width and slightly sloping away, in the condition that a bank, left by
146 teams working along it when plowing and then have been scraped away—that was what you would call a shoulder of earth, left where the other wall had stood.

Q. And you say that was about two feet in width at the top next to the wall?

A. Two to three feet, I would say.

Q. Now, in width which way from the wall, out or along the wall?

A. From the wall out; it was the shoulder on which the former wall had stood.

Q. Now, passing back along the wall, how far did that first shoulder that you have spoken of continue?

A. Well, it extended in one sense all along the wall, as left by the teams, but had been worked on some at different places with pick and shovel, as though to mark out other excavations similar to the one at the corner of Central avenue.

Mr. FIELD: We move to strike out the answer of the witness, as though.

The COURT: The last part may be stricken out as not responsive, and the jury are not to consider the latter part of the witness's statement, as though for a certain purpose.

Q. Now, Mr. Ross, describe the appearance of the excavations farther back, which you have just referred to as having been made with a pick and shovel. Describe them in detail, giving their location and their extent and any other facts concerning them, which you recollect.

147 A. There were, as near as I can remember now, several places along this shoulder where cuts four or five feet in width had been commenced with pick and shovel, and one at about fifty feet back or south from Central avenue—one had been made entirely through this shoulder—I think the last one was about four or five feet deep.

Q. And did you notice, with regard to that last one fifty feet back, as to whether or not it extended under the wall?

A. No, I could not tell from that one as I looked at it then, because I was looking directly into it from the line of the street and not along the line of the wall.

Q. When you surveyed this line, Mr. Ross, and marked it out, did you have before you, or were you shown, the basement plans of the building that it was purported to erect upon it, or intended to erect upon it?

A. Not at that time.

Q. Did you see the building after the time that you have stated, at one or two o'clock in the afternoon, until it fell?

A. I did not.

Q. And how did you see it after it fell?

A. I saw it at six o'clock that afternoon, after the fall.

Q. Now, describe the appearance of that building as you saw it that evening after its fall.

A. Well, it was in a very dilapidated condition; the east wall had slid out and was—the greater portion of it lying in lot one—the roof which still clung to its fastenings on the west side of the
148 building lay in a slant—the rafters resting—the east end of the rafters resting in a confused mass of adobes and other debris. A little to the west of the east line of the lot—the length of the rafters, of course, not being sufficient to stay with the wall as it fell, and that portion of the wall, the east wall, commonly called the fire wall, was broken up and strewn along the edge of the roof.

Q. What do you mean in that connection, by the fire wall?

A. Buildings of that sort generally have enough of the wall running above the roof to form a sort of protection from other directions—it is commonly called a fire wall.

Q. In this case how was it?

A. In this case it was perhaps two feet above the roof—this amount of wall.

Q. To what extent had the wall fallen?

A. Something over fifty feet of it.

Q. Did you notice where the roof rafters lay with reference to their original position in the wall in any other particular than you have testified to?

A. Well, they were somewhat broken up at the front end, or the northwest corner of the building—northeast corner of the building, as near as I can remember, but when I went inside it was getting dusk and one could not see very well, and I did not go back again after that.

Q. Did you then, or later, take notice as to whether or not those roof rafters or roof supports or ceiling supports had apparently fallen straight down, or had moved to the north or to the south of
149 their original position in the wall?

A. Well, right at the—close to the Railroad avenue line they had gone a little north, but the natural result was for all to fall a little to the west, into the store.

Mr. FIELD: I move to strike out the witness's opinion as to the natural result, as not responsive.

The COURT: I think he meant it as a fact.

Mr. WOOD: The last part of it I do not care particularly about; the witness has already testified to that.

The COURT: The natural result of the fall, that may be stricken out.

Q. Irrespective to their movement to the west—irrespective to their striking a point west of the original position, what I wanted was, whether you noticed all along there if the rafters or ceiling joists in falling moved to the north or to the south or fell straight down.

A. I could not say as to any part of it more than just that in the corner.

Q. What, if anything, did you notice as to the front wall of the building after the fall?

A. It was pushed to the north, leaning into the street?

Q. To what point was it pushed to the north in the front?
A. The northeast corner.
Q. Did you notice whether the northwest corner had become detached from, or moved from, that wall?
150 A. Not to any great extent; the timbers were cracked and strained.
Q. Now, in the debris that had fallen into the lot one, as you have stated, what did you notice as to the condition of the adobes that lay there, as to which side of them were up, or any other peculiarity of their position or condition that you may have noticed?
A. They lay pretty generally with the weathered side up and plastered side down.
Q. Particularly calling your attention to the point at the northeast corner of the building on lot two, at the point where you state the excavation was made under the wall, will you describe the appearance of the adobes at that point, as they lay after the fall?
A. They were very much broken up.
Q. And how about the weathered side and the plastered side at that point, so far as they were visible?
A. That was not very distinguishable.
Q. Did you notice along the wall as to the position of any foundation stones of the wall after the fall?

Mr. FIELD: I object to that question, because the witness has not stated that he knew any foundation stones or could recognize them.
Mr. WOOD: I think the question was broad enough to call for an answer to that too. I will withdraw the question temporarily.
151 The COURT: Very well.

Q. How was this adobe wall on the building on lot two constructed from the bottom up? Describe its characteristic construction as you saw it before the fall.
A. As I saw it before the fall, well it was a usual adobe wall on a light stone foundation—I think there were red sandstones in the foundation, and adobes made in the usual manner.
Q. Can you tell us the thickness of the wall?
A. Well, it was what would be called an eighteen inch wall—adobes of the usual size, which are eight and one-half by sixteen or seventeen inches, and then the addition of the plaster made it practically an eighteen inch wall.
Q. Now, as to the foundation stones, what was their depth, if you observed them?
A. Well, I could not say about that at the time, for the loose dirt that was left where the other wall had been removed—one could not see more than a foot, or perhaps fifteen inches of the foundation, and whether it went in deeper than that I did not know at that time.
Q. Now, after the wall had fallen were any foundation stones visible?
A. They were not on that day; they were afterwards.
Q. You saw them afterwards, did you?
A. I did.

Q. And how soon after?

A. I think the wall—the walls were finally cleared up—re-
152 moved in August, about the 5th or 6th I think it was.

Q. Were you present there when the debris from the fallen walls was being removed from lot one?

A. I was there much of the time.

Q. And did you see the operation of removing that wall, and the condition of the material in it as it was removed, and the condition of the material?

A. I did.

Q. Now at that time when they were—when the material was being removed, did you note the location of any of the foundation stones in the original wall?

A. I did.

Q. Where were they?

A. Beginning at Central avenue, there was a block of foundation which had fallen in, back, and had pitched forward a little on the north—into this five foot excavation which had been made and which I had described, and lay there almost intact—didn't come to pieces. There was one solid piece the size of that table and a foot and a half thick.

Mr. FIELD: Let us give the size of the table in the record.

A. It is about two by three feet; back of this point the foundation appeared to have tipped over to the east and most of it—and it was pretty generally pulled to pieces, the wall having gone out to the east and there were only a few of the first stones of the foundation—perhaps a layer of them, under the footing; the appearance of
153 the adobes as they were taken up, if I may illustrate (witness using stenographer's flexible notebook) was lying thus—the wall had buckled here and gone out like that (indicating manner.)

Mr. FIELD: Where is here?

A. As I said, here, where my hand is—the wall had buckled apparently three or four feet from the foundation and gone out to the east, and the rest of the wall lay like a blanket over it, with the weathered side of the adobe up and the plastered side under it. (Illustrating with same book.) The lower section of the wall—about four feet of it, had been entirely broken up, and some of these broken pieces lay under the unbroken adobes at a distance of eight to ten feet from the line of where the wall had stood; there was also some of the stones of the foundation lying the same distance from where the wall had stood.

Q. How far from their original position in the foundation walls did you say you found some of the foundation stones lying?

A. There were a few that lay four paces east of the line, being at least ten feet out of place.

Q. Were there any foundation stones between that point and the wall?

A. Yes, they were scattered along.

Q. Did you notice after the wall had fallen, what, if anything, was under the point at which it divided when it fell?

Mr. FIELD: I object, because, as my recollection goes now, the

witness has not testified that the wall ever did divide before
154 it fell.

The COURT: He said it fell to a distance of a little more than fifty feet back, I believe.

Mr. FIELD: I do not remember.

Mr. MANN: Yes, he testified to that.

Mr. FIELD: That escaped my attention.

A. I did.

Q. And describe that point and the condition of the wall at that point as you observed it after the fall.

A. The wall broke opposite one of the excavations which I said was about fifty feet back from the street. The actual distance at which the wall broke was fifty-three feet. At this point the foundation stones went into the excavation in a body, though broken up, and the wall was crumbled up very similar to the north end.

Q. Now, at the time the wall fell, immediately afterward, could you ascertain the exact extent to which that excavation back at the fifty foot point had been made?

A. Not with any great degree of accuracy, because the hole was filled up with these stones and broken adobe, except at one corner it was partially open.

COURT: Except at one corner?

A. Yes, except one corner.

Q. Did you afterward, and when the debris was cleared
155 away, examine the extent of this excavation?

A. I did before the debris was cleared away, to a certain extent, by slipping a rod down through—between the stones.

Q. Now describe its extent as you ascertained it at that time, or at the different times after the wall fell.

A. The first occasion was when I was surveying lot two after the fall of the building, and making a measurement directly at that point. I slipped a little steel rod down into the hole and judged from that that it was about six feet below the line of the sidewalk, or the line of the wall at it stood then, the piece of the wall that was left, and afterwards when the adobes and stone had been cleared out, it appeared to be an excavation about five feet in width and the depth was about as I had judged it was from this first measurement—I didn't make any more particular measurement.

Q. And where was the west line of that excavation with reference to the division line between lot one and two?

A. It was practically at the line of the lots; it didn't appear to have been finished or gone under the other wall.

Q. I show you a photograph, Mr. Ross, and will you tell us whether or not that is a correct representation of the appearance of the wall, from the point you viewed, that it purports to show it as it appeared after the fall and as you saw it?

156 Mr. FIELD: It does not appear that this witness took the photograph or that he knows anything about what it purports to show, and unless he is an expert, the jury can tell as much about it as he can.

Mr. WOOD: The jury didn't see it.

The COURT: I think we went through this before: I think you had some proof as to the point from which it was taken.

Mr. MCMILLEN: The ruling, as I remember it, as I looked it up at the time, is that it is simply a question of whether it is a correct representation from a particular point.

Mr. MANN: I wish to place in the record an objection on behalf of defendant Weinman, for the reason that it is not shown when or by whom it was taken, whether or not it was taken by any competent photographer, or from what point of view it was taken.

The COURT: I think at the former trial he did testify from what point of view it was taken—somebody did.

Mr. WOOD: I will withdraw the question for the present.

Q. Mr. Ross, can you state from what point of view that picture shows the building—the wall as it was after it fell?

Mr. FIELD: I object to this going to the jury—this is merely a matter of laying the foundation for the introduction of the
157 photograph.

The COURT: You may answer for the benefit of the Court.

A. I can.

Q. And from what point of view does that represent the wall as it was after it fell?

A. It represents the building as it appeared from a point in about the center of Central avenue, or Railroad avenue, and close to the west line of Second street, and as the building appeared the day after it fell.

Q. State whether or not it correctly represents the appearance of the building and of the wall at that time, from the point of view you have described.

Mr. FIELD: To which we object.

A. It is a correct representation.

Q. When did you first see that photograph, Mr. Ross, if you recollect?

Mr. MANN: It is objected to as incompetent, irrelevant and immaterial when he first saw it.

Mr. WOOD: I expect to show that by the witness——

The COURT: That, of course, has not yet been shown.

A. As a matter of fact, I saw the proof of this when the artist made it, before it was mounted; then I have seen it at the different trials of this case.

Q. Who made that, if you know?

A. W. H. Cobb.

158 Q. Do you know whether or not Mr. Cobb is living?

A. He died a year ago—or a little over.

Q. What was his business?

A. Photographer.

The COURT: None of this has gone to the jury.

Mr. FIELD: I object to any of it going to the jury, and I want to

cross-examine the witness before your Honor passes on the admissibility of the photograph.

The COURT: I thought Mr. Wood was proceeding as if he thought the jury was getting it.

Mr. WOOD: No.

Q. State whether or not the condition of the building at the time that photograph was taken is the same or different from what it was when you first saw the wall after it fell on that night?

Mr. FIELD: I object to that as calling for an opinion of the witness; the fundamental proposition being, if the photograph is admissible at all, the jury is as competent to draw the deductions from it as is the witness.

Mr. WOOD: The witness stated this appeared as it was the next day, and I am simply asking him whether or not the conditions were substantially the same.

The COURT: He may answer, subject to the objection for the moment.

159 A. The photograph represents the building as I saw it at six o'clock on the evening after it fell, with the single exception that this cedar pole which has been put up as a brace to hold the front, was not up at the time I first saw it—men were just getting that there and beginning to raise it. I did not see it that night with the brace up, but did the next morning with the brace in position—the wall was leaning forward into the street, and the poles had been brought there by direction of the marshal and others, to protect the street.

Q. When you say the evening after it fell, you mean the evening of the same day that it fell?

A. The same day—about six o'clock—the same evening after it fell.

Mr. WOOD: I ask counsel to concede that this photograph was produced and introduced by them upon the first trial of this cause.

Mr. FIELD: We will concede nothing of the sort, whether the fact be as asserted or not. We are called upon to make no such concessions, and decline to do it. We might want to put that in now, and if we do, we will do it without the assistance of the gentleman.

Mr. WOOD: I think I will call him to the stand and make him do it.

Mr. FIELD: What the gentleman will do is still in the

160 womb of time.

Mr. WOOD: I want to offer the photograph.

The hour of 12 o'clock noon having arrived, a recess was taken until 2 o'clock p. m. of this day.

Mr. WOOD: I wish to offer the photograph in evidence.

The COURT: Mr. Field says he wants to examine the witness on the question of the photograph.

Mr. WOOD: I object to any interruption of the direct examination. If, upon cross-examination, it should develop that the photograph

was not correct it could be stricken out; we say our course should not be interrupted by cross-examination at this time.

The COURT: This has not been going to the jury so far, what the witness has said about it, but I do not know that it is for the jury really—the question was whether the photograph should be for the jury. I think I will allow Mr. Field to question the witness about the authenticity of the photograph.

Mr. WOOD: Then I withdraw the offer at the present time.

Mr. FIELD: Then I do not care to ask him anything.

Mr. WOOD: I ask that this be marked, for identification, as the photograph concerning which he testified.

Thereupon the photograph referred to was marked plaintiffs' exhibit D, for identification.

161 Mr. FIELD: We wish the record to show that if the photograph is offered in the future during the trial of this cause, that we wish to cross-examine the witness in illustration of our objection to it.

Mr. WOOD: So much of the witness's testimony as identified the photograph, and as stating the point which it saw, I think should go to the jury.

Mr. FIELD: I do not think any part of it should go to the jury.

The COURT: I do not think I will let any of it in at this time.

Mr. WOOD: We except—I expect to offer the photograph in evidence.

The COURT: Yes: then at that time—there is really nothing which he said which would be for the jury, except the point of view from which it was taken.

Mr. WOOD: Is it not essential that evidence of identity should go to the jury, upon the question of the authenticity of the photograph?

The COURT: When you offer it we will see about it.

Q. Mr. Ross, I show you another photograph, and will you tell us from what point of view—from what point this is taken, if you know, and what it represents, what it purports to show?

Mr. MANN: Objected to for the reason that the photograph itself will show what it purports to show, and for the reason that
162 the witness has not shown that he knows, or was present, when the photograph was taken, or by whom it was taken or when it was taken.

Mr. WOOD: We submit that none of those facts are necessary to the establishment of the photograph as evidence.

Mr. FIELD: I make the same specific objection, that unless the witness is an expert, the jury can tell all about the photograph, and if the witness did not take the photograph and was not present when it was taken, there is no competent evidence he can give about it.

The COURT: I do not know as to that.

Mr. WOOD: This is a different photograph, and I want to dispose of this witness while I have him here; then the counsel can cross-examine as much as he has a mind to, and I can present the photographs later without interrupting my examination.

The COURT: Read the last question. (After hearing the question read) He may answer.

Mr. FIELD: We except.

Mr. MANN: We except.

Mr. WOOD: This goes to the jury.

163 The COURT: Yes.

A. This view is taken of the east wall of the Ruppe building, representing that part which stood after the fall of the building—the condition of the part which had fallen, looking northwest from a point on the Second street sidewalk, about ninety feet south of Railroad avenue.

Mr. MANN: We move to strike out the answer, for the reason that it is not shown to be based upon any personal knowledge of the witness. He has not testified nor shown that he was present when the photograph was taken, or that he even knows who took it or when it was taken.

Mr. WOOD: We have not gone that far yet.

Mr. MANN: Well, he has testified about where it was taken from.

The COURT: Proceed.

Mr. MANN: What is the ruling?

The COURT: He said he wants to ask a question or two more on this subject.

Q. State whether or not that correctly represents the appearance of the building as it appeared to you after the fall, from the point that you have designated as being the one from which it was taken.

164 Mr. MANN: Objected to, for the same reason, as incompetent, irrelevant and immaterial and no proper foundation having been laid for it.

The COURT: Overruled.

Mr. MANN: Exception. Is the other objection also overruled?

The COURT: I overrule that.

Mr. MANN: I want exceptions to the ruling on both.

Mr. FIELD: That is for both of us—the objection and the exception.

A. It does.

Q. Do you know by whom that photograph, or picture, was taken?

A. It was taken by my brother-in-law, W. H. Cobb.

Q. Is he living or dead?

A. He died a year ago?

Q. Do you know when it was taken?

A. My recollection is, it was taken the day after the building fell, very soon after the building fell.

Mr. MANN: The witness does not answer the question; the question was, do you know.

The COURT: Do you object?

Mr. MANN: I did not object to his saying whether he does

165 know: I want the answer stricken out.

The COURT: I will overrule the objection.

Mr. MANN: Exception.

Mr. WOOD: We ask to have this photograph marked for identification.

Thereupon, the photograph referred to was marked plaintiffs' exhibit E, for identification.

Q. I show you a third photograph: will you tell us whether or not this is a correct representation of the building as it appeared after the fall, from any view point?

Mr. MANN: I object to it for the same reasons heretofore given.
The COURT: Overruled.
Mr. MANN: Exception.

A. It is.
Q. And from what point?

Mr. MANN: Same objection.
The COURT: Overruled.
Mr. MANN: Exception.

A. It is taken from the north side of Central avenue, or Railroad avenue, as it was called at that time, and looking south along the line between lots one and two, of block sixteen.

166 Q. Do you know by whom that photograph was taken?
A. W. H. Cobb.
Q. The same party you mentioned before?
A. Yes sir.

Mr. WOOD: We ask to have that marked for identification.

Thereupon said photograph was marked plaintiffs' exhibit F, for identification.

Mr. WOOD: Now, if counsel desires to cross-examine the witness in regard to the photographs, we will give way: I now offer the three photographs, identified by the witness, in evidence, and heretofore marked for identification, exhibits D, E and F.

Mr. FIELD: As far as the defendant Barnett is concerned, I do not wish to cross-examine the witness, but I object to the admission of the photographs, on the ground that no proper foundation has been laid for their admission.

Mr. MANN: The defendant Weinman objects to the introduction of either of the photographs, that no proper foundation has been laid for their admission.

The COURT: I suppose it is not important to have those introduced just at this moment. I wish to look at the authorities.

Q. I asked you sometime ago to descri*ed* the front of the building after the wall fell, and you did so in part. Now, in regard to
167 the materials that were in the adobe wall, I would ask you whether or not any of those materials fell upon the sidewalk in front of the building?

Mr. FIELD: Objected to as leading and suggestive.
Mr. WOOD: Question withdrawn.

Q. Will you tell us more in detail as to where the material from

this adobe wall fell, from that part of the wall nearest Railroad avenue?

A. Some portions of the north end of the wall had fallen to the north and there was some debris on the sidewalk, such as pieces of plaster and corners of adobes, which had, in the thrust forward—had fallen past the—I do not know just how to call it—the front of the building was of a different structure, and these adobes had fallen from behind the front column rather, and forward and a little to one side, and some had landed on the sidewalk. This pressure—the same pressure that had forced the front to the north out over the sidewalk, had been the cause of these falling on the sidewalk.

Mr. FIELD: I object and move to strike out the answer as an expression of opinion and not testimony as to a fact, and not responsive.

The COURT: The last part of it would seem not to be.

Mr. WOOD: That part in which he said some fell to the *to the* north and some on the sid*e*walk, I think are statements of fact.

168 The COURT: Those are statements of fact. The part of the answer in which he gave his opinion of what it showed, need not be considered.

Q. Mr. Ross, at what time when you first saw the men working in that excavation at the corner under the wall—three men, as you said—were there other men working upon that lot?

Mr. FIELD: Objected to as leading and suggestive.

The COURT: Overruled.

Mr. FIELD: Exception.

A. There were other men working in another part of the lot, towards the south; I did not pay particular attention to what they were doing; they seemed to be gathering up and clearing the ground.

Q. Did you observe as to whether or not any portion of the foundation wall in the excavation had been laid at that time?

A. I think it had been laid on the east and the north, particularly around the north side, both ways from the corner of Second and Railroad.

Q. And what is your best recollection as to how far from the corner of Second and Railroad—or in other words, how near to the excavation that you have described was the wall laid at that time?

A. Something more than half way along Railroad Avenue.

Mr. WOOD: I think that is all for the present.

169 The COURT: I will now overrule the objections to the photographs.

Mr. FIELD: We except.

The COURT: And the photographs are admitted.

Mr. MANN: We also except.

(Inasmuch as it is impracticable to incorporate the said photographs heretofore marked Plaintiffs' Exhibits D, E and F in this bill of exceptions, the same are ordered to be transmitted by the Clerk of this court to the Clerk of the Supreme Court of New Mexico as a part of the record in this cause.)

Cross-examination by Mr. MANN:

Q. How long have you resided in Albuquerque, Mr. Ross?
A. Within the city limits, about eleven years.
Q. Were you living in the city of Albuquerque at the time this wall fell in 1902?
A. I was: I was city engineer of Albuquerque at that time.
Q. On the day that the wall fell, and that you saw these excavations you have testified about, what time of the day was that?
A. I think the time that I have testified to was about half past one or a little before two o'clock.
Q. And was that the time that you saw those excavations you have spoken of along next to the Ruppe wall?
170 A. It was not the only time; it was the last time before the building fell that I saw them.
Q. How many times had you observed those excavations along there, or piers, as you have testified?
A. I had been by there the evening before, and that forenoon also.
Q. And how many excavations for piers did you see along that wall when you were along there the evening before?
A. I think I noticed the one at the south end about fifty feet back, the evening before that.
Q. Was that the only one you noticed the evening before?
A. I am not sure if I noticed the ones at the northwest corner of lot one or not, before.
Q. Well, how many excavations for piers did you see in the forenoon of the day the wall fell?
A. Well, they were at work on the northeast corner of lot one in the forenoon, when I was down in the morning, and some men were working along the wall a little further back, but I did not notice just what they were working at then—they were simply working——
Q. Then as a matter of fact, and as you went along there about two o'clock in the afternoon of the day that the wall fell, you had never noticed but the two excavations for piers, one at the northwest corner and one fifty feet back?
A. That was all that I remember having noticed before that time.
Q. Now, did you notice how deep that excavation fifty feet
171 back from the sidewalk was the evening before?
A. No, sir, I only saw it from the corner of Second and Railroad—I was not near it.
Q. And from there you could not tell its depth nor could you tell that it was exactly flush up with the wall, could you, on the Ruppe wall, the lot occupied by Ruppe?
A. Well, I could have told if I had noticed particularly, but I just simply saw that there was something there—I did not notice it then, as I say.
Q. Well, you didn't know—you cannot now tell from what you saw then how deep it was or how close it approached to the Ruppe wall?
A. Not from what I saw the night before, no.
Q. Well, can you state from what you saw in the forenoon of the

day the wall fell how deep that excavation fifty feet back was, and how close it approached to the walls of this building?

A. No, I cannot from what I saw in the morning—I only passed down Railroad Avenue then— I didn't go along Second Street in the morning.

Q. Now, Mr. Ross, at two o'clock or between one and two, whatever time it was that you passed there in the afternoon—the last time I mean, that you saw this excavation before the wall fell, how many excavations were there along that wall for piers?

A. Well, as I came along Second Street coming north, I stopped and looked at the work some then, and noticed the one at fifty feet, and some other work at intervals between that and Railroad Avenue. I would not say if there were more than two or three
172 between the two points, there might not have been more than two, but there were places, where cuts had been made into this hip, or shoulder, left along the wall, although the only men working with picks and shovels at that time were in the corner, and I passed along Second Street, turned the corner and stopped there to watch the men at work.

Q. Then you would not be prepared to say—you do not recollect just how many of those excavations there were, I mean for piers, along the wall that fell?

A. Well, my recollection is that there were at least two partial excavations between the one at Railroad Avenue and the one fifty feet back.

Q. You don't know how deep those partial excavations were nor how close they approached to this wall, do you?

A. They were not more that three or four feet in depth—the two—between the extremes, but they were dug where the foundation of the Barnett wall had stoood and approximately up to the line of the Ruppe wall.

Q. The excavation back at fifty feet that you have testified to seemed to be complete did it?

A. Not entirely so, no.

Q. How deep did it seem to be?

A. Well, it seemed to me at that time to be only down to the depth that the teams had excavated.

Q. And how deep was that, Mr. Ross?

A. Well, as ascertained afterwards, it was between five and six feet.

173 Q. But I am asking you how deep it appeared to be to you at that time?

A. Well, I could only judge by the appearance of the men in the pit—it was about as deep as a man was tall.

Q. Now, at the corner where you stopped, how deep was that excavation?

A. Well, I think that was fully seven feet, because as I stood there the men's heads were a foot or more below the top of the sidewalk.

Q. Did you say this morning that that excavation extended to the west and under that wall?

A. I said that it slanted to the west.

Q. And how much did you say it slanted?
A. About a foot.
Q. You were a witness in this case, Mr. Ross, at the former trial—at two or three former trials—in November, 1906, the second trial, were you not?
A. I do not remember that date, but I was, I think, a witness at that time—I have been a witness in each case.
Q. You have been a witness each time it has been tried, so far as you know, have you not?
A. Yes, sir.
Q. At that time did you testify that this excavation extended under that wall?
A. I do not remember just what my testimony was at that time.
Q. To refresh your memory I will ask you if you were not asked this question, and if you did not answer as I shall read to you?
174 Q. "State to the jury as near as you can the condition of the excavation at that time; a full description covering all that you saw." And did you not answer as follows: A. "There were, I think, about three men at work there, at the time that I passed, and there were some stone being gotten forward apparently in readiness to be put in—but the men—two of the men, I think were standing in the excavation, with spades, so that I cannot state exactly the condition of that excavation inside, further than that as I say there were evidently preparations making to get stone there; that the walls were pretty clean cut and they were shoveling out a little of the waste at that time; I did not see the excavation again after that until after the building had fallen." Were you asked that question and did you so answer?
A. I think so, if that is the record, that is my recollection.
Q. Now you were also asked this question: Q. "Where was the point that you have just been describing?" And did you not answer as follows: A. "That was at the northeast corner of the Ruppe building on the dividing line between lots one and two, abutting, and a trifle under the sidewalk—enough to lay the footings." Was not that the question and the answer you gave to this?
A. Yes sir, that was right; that is just the same as I have testified just now, as far as I went.
Q. Well, your recollection was just as good, or a little better, then than it is now, wasn't it?
175 A. It certainly would be—I might not have gone as far——
Q. Well, did you not say in this answer—you were asked for a full description of all that you saw, weren't you, in the question?
A. That was the question——
Q. And did you not answer at that time that it was on the dividing line between lots one and two and a trifle under the sidewalk?
A. Yes sir.
Q. But as a matter of fact at that time, and in your testimony, at that trial, and also, at the trial before that, you never stated that it was to the west and under the wall, is not that true?

A. No, I think that is not true—I have testified heretofore that it was under the wall.

Q. But I am asking you about these particular trials?

A. You have reference to the trial before Judge Baker?

Q. And the first trial before Judge Abbott—the two first trials—this is the fourth I believe.

A. Well, as to that, I cannot say, of course, whether I stated anything more; it is just barely possible that the stenographer didn't get all of my answer in—that sometimes occurs.

Q. You think then, that you did testify that it was under the wall and that the stenographer didn't get it in the record at either one of those trials?

A. No; I say that might possibly be the case.

Q. And it might possibly be the case that you didn't say
176 it, and for that reason the stenographer didn't get it.

A. Certainly, it sometimes occurs to a witness on the stand, as he is going along—he states what—he thinks he is getting it all in and he may leave out something unintentionally. What I have to state now is, that it was a fact nevertheless that I have testified that that excavation was under the wall.

Q. And that the stenographer didn't get it?

A. No, I do not say that—I say that what I have to state now is that I have testified previously that it was under the wall—I do not say particularly as to that particular time.

Q. At that same time and place weren't you asked this question: Q. "Now, what was the condition of the excavation of the whole lot, Mr. Ross, as it ran back to the south?" And did you not answer as follows: A. "Well, I think the excavation was entirely completed at the northeast corner and the wall was in, running along the Second street line a little way—that is, I mean, the foundation wall, and some along the Railroad avenue line, and the bulk of the earth had been removed for probably seventy-five feet back from Railroad avenue and pretty close, perhaps at some places four or five feet out from the Ruppe wall, and then a series of cuts had been started—I suppose for other piers along the wall." Did you not so answer?

A. I did: and that was the fact: I have testified this morning that the bottom of the excavation had not been completed.

Q. I am not asking you what you testified this morn-
177 ing——

Mr. FIELD: I ask to strike out the answer of the witness, and that is the fact, and I so testified this morning.

The COURT: Well, if you think it is important.

Mr. FIELD: I think it is important that the witness should answer the question.

The COURT: The witness will confine his answers to the question.

Mr. WOOD: Has the witness no right to qualify his answer?

The COURT: Not at this moment.

Mr. MANN: It is not an explanation to say, I testified this morning or some other time.

The COURT: I have ruled upon it, and I have instructed the witness to answer the question, and if there is anything that needs ex-

planation, or counsel thinks needs explanation, counsel can ask to have it explained.

A. I would like to explain that statement in there as to the bulk of the excavation.

Mr. FIELD: The question is not, what the testimony is now; the question is, what the testimony was on the former trial.

Mr. MANN: We ask again that that portion of his answer,
178 what he said he testified this morning, be stricken out and that the jury be so instructed.

The COURT: The jury are not to consider what he says he testified this morning: he was asked if he did not testify in a certain way at another time.

Q. Now, weren't you asked this question at the same time, and did you not give the following answer: Q. "About at what intervals did these series of cuts toward the Ruppe wall occur?" A. "Well, I did not measure them, but I think probably five or six feet apart." Q. "Did those extend at such intervals all the way back, to the one that you mentioned fifty-three feet back?" A. "I am not just sure if they were all in, but I think there were about four cuts at least: I did not pay much attention as I was going by, along Second street at that time, until I got around to the corner, and from there looking back, I could not tell to a certainty." Were you asked those questions, and did you give those answers?

A. Yes sir.

Q. When was it that you made a survey or measurement after the wall fell?

A. I think that was in July.

Q. Is it not a fact that it was in August, Mr. Ross, and did you not so testify to that at the former trial?

A. Well, it might have been—I have not the record with me at present—it was sometime about then—it was before the debris was removed.

Q. Is it not a fact that you had a memorandum, or book,
179 at that time that you referred to in giving your testimony and that you testified from that memorandum that it was on the 23rd day of August, 1902?

A. I did.

Mr. WOOD: The last question—I have not followed it as it went through, to see the connection—but I do not think it was quite fair to the witness—as I read it here it does not say any such thing as the 23rd day of August, 1902, when he made the survey, but speaks about certain stones being on the line on that day—that, as I remember it, was subsequent to the removal of the debris, or about that time.

Mr. MANN: It may be I am wrong, but I think that refers to the time he made the survey.

(Witness interrupts.) I had a vest pocket memoranda of work in connection with this affair, in which I had jotted down some dates of other surveys, and certain things which I had seen on the ground

during this removal—Mr. Field objected to my using the book, and I put it in my pocket and I have not been able to find it since.

Mr. FIELD: I ask to have all of this stricken out, as not competent for any purpose whatever.

Mr. WOOD: The record shows exactly the fact that the witness had testified to.

Mr. FIELD: The court must have sustained my objection.

180 The COURT: He was asked just now about that book.

Mr. MANN: I asked him if he didn't use a memorandum; I will say to the court that I may be mistaken as to whether Mr. Ross so testified—I was trying to fix the day it was.

(Witness interrupts.) That day—the 23rd day of August, was the date I spoke of finding certain rocks—by measurement, and the conditions.

Q. Well, at any rate, you did make a survey, or measurement of some kind there after the wall fell, did you not, Mr. Ross?

A. Yes sir, I made two surveys, at the direction of Mr. La Driere.

Q. After the wall fell?

A. After the wall fell—the first one was to set out the additional boundaries desired for the double structure which was then to be put up—or the west line of lot two—the other was to represent on the plat the condition of the wall as it was left standing.

Q. That is the one I refer to: that is the first one you made, was it, after the wall fell?

A. Well, I won't be sure; that probably was the first one—the one as to the condition of the wall—it represented the vertical line of the wall.

Q. At the time you spoke of this morning, in your direct examination, as to when you saw the condition of the fallen wall and of the condition of the adobes at the northeast corner of the building, was that the time you made the survey, or was it prior to that time?

181 A. I think what you refer to was after the survey.

Q. It was, you say, after you made the survey that you made the examination as to the foundation stones and the adobes, etc., that you testified about this morning?

A. If you have reference to what I stated in regard to their condition as they were being removed, it was after the survey.

Q. You were asked, I believe, about the adobes at the northeast corner of the building that fell, and as to whether or not they lay with the plastered side up—with the weathered side up, generally: were you not, this morning?

A. I believe so.

Q. And did you not state at that time this morning, that it was hard to tell with reference to that?

A. With reference to those which fell in the pit directly at the corner, yes.

Q. I will ask you if, at the same trial which I have mentioned—the second trial of this case—you didn't testify as follows:

A. "The first six or seven feet south from Railroad avenue, the

adobes were much broken up, perhaps half of them, showing with the plastered side to the air. The bulk of the wall for forty feet back, lay, three-quarters of them with the outer face up, only here and there a plastered face showing on the surface of the debris. At the south end where these boards are shown the adobes were much broken up—in the same manner as at the north end." Did you so testify?

182 A. I think so.

Q. Then, as a matter of fact, about half of the adobes at the corner lay with the plastered side up, did they?

A. No: I said they were very much broken up in the first five or six feet, or six or seven feet, whichever it says there—I did not understand you to read that I stated that half of them were with the face up—plastered side up.

Q. I will read it again then, so you may be informed.

A. Just the first part, please.

Q. The answer is "The first six or seven feet south from Railroad avenue, the adobes were much broken up, perhaps half of them, showing with the plastered side to the air."

A. Perhaps half of them—I think that was right.

Q. And that is the condition, is it—about half of them?

A. Well, hardly that: it would be difficult to say for that first five or six feet—they were so crushed and broken—you see that end of the wall dropped almost straight and a little north.

Mr. FIELD: I ask to have all this stricken out as not responsive.

The COURT: That last part may be stricken out.

Mr. WOOD: I submit that it is responsive.

The COURT: I think the question was, how the fact is, but
183 that did not call for the relation of the reason why it would be so.

Q. Is that the corner—is that the place where the foundation of the size of that table was intact?

A. That is the place where I said there was a piece of that size intact.

Q. You have considerable feeling in this case, have you not, Mr. Ross?

A. I do not know that I have.

Q. Is it not a fact that you have pretty strong prejudices against Mr. Barnett, from the fact that he is engaged in the liquor business?

A. No sir: I have had pleasant business relations with Mr. Barnett; never had a controversy with him, of any sort.

Q. You are not prejudiced against him in any way on that account?

A. Not against the man, no sir.

Mr. MANN: That is all.

Cross-examination by Mr. FIELD:

Q. You have, however, Mr. Ross, a strong prejudice against the business in which Mr. Barnett is engaged?

A. I have very decided prejudices against the saloon business, yes sir.

Q. And you hold the saloon men of Albuquerque responsible for your having lost the position of city engineer, do you not, Barnett amongst them?

Mr. Wood: We object to that as irrelevant, incompetent
184 and not proper cross-examination and not tending in any way to bear upon the issues of this case, or his relations to Barnett.

The Court: He said he had strong prejudices against the business—it seems to me it would lead too far. I will sustain the objection.

Mr. Field: I except, and offer to show by the witness the affirmative of the question.

Q. Now, Mr. Ross, is your recollection of this transaction better than it was when you testified on the first trial?

A. Well, on some points I think it is, but of course I am somewhat out of touch in some matters.

Q. On what points do you think your recollection is better now than it was when you testified on the first trial, which was held on the 13th of April, 1903, within a year after the falling of the wall?

A. What point have you reference to?

Q. You say your recollection——

A. I could not specify that, unless my attention was called to some particular point.

Q. Well, why do you think that your recollection could be better on any point in relation to this matter now than it was within a year after it happened?

A. My idea about that is this—that sometimes a question is put to me differently than at other times, and it doesn't jar the right part of the gray matter.

185 Q. If you don't get your gray matter jarred in the right way, you do not give the same answers to the same question?

A. That might be.

Q. Well, now, Mr. Ross, you were employed by Mr. Ruppe to go there and see that debris removed, weren't you?

A. Yes sir.

Q. It was your business to stay there and see it removed, was it not?

A. As to certain points, yes sir.

Q. Well, was it or was it not your business, and were you paid by Mr. Ruppe, to go there and see this debris removed?

A. I was.

Q. Now, don't you know that when the debris was removed, that the foundation of the east wall of the Ruppe building, from a point about five or six feet back from the sidewalk, all the way back to the place where the wall broke, was found in place—in the ground?

A. No sir.

Q. It was not a fact?

A. No sir.

Q. Who removed the foundation—who removed the debris?

A. Some workmen of—I think Mr. Anson—I think they were working men of Mr. Anson——

Q. Do you know George Steiner?

A. I do not know that I do.

Q. Do you know a man who was a foreman for Anson—Ed Steiner—do you know who the man was who was foreman for Anson in removing that debris?

186 A. The man that I remember as being there in charge, was a man not quite as tall as Ed Steiner—he has been foreman for Mr. Anson also on sidewalk work, but I do not know his name.

Q. The foreman of Mr. Anson on sidewalk work is a little Swede, is he not?

A. Not the one I have reference to—he has served on different jobs.

Q. Well, do you know whether or not a man by the name of Ed Steiner was the foreman for Mr. Anson in Albuquerque, in removing this debris?

A. No, I do not remember that Ed Steiner was the foreman.

Q. You do know Ed Steiner?

A. Yes, I know him.

Q. Well, will you say that the man who was foreman for Mr. Anson there was not Ed Steiner?

A. My recollection is that he is not—I have got his picture here in my pocket, if you will allow me to look at it.

Q. You took his picture?

A. I had a little view taken there of the work as it was going on, and I think it was the man that was in charge (witness producing photograph and examining it) the man standing at the left is the man who I remember as foreman there, and that is not Ed Steiner. (Handing photograph to counsel.)

Q. Well, now, there are three men here: do you mean the man standing with the spade at the left, the one in the middle, or the other?

187 A. The one at the margin of the view—he is not at the left, he is at the right, the third man, that is the man that I remember as foreman and that is not Ed Steiner—I passed him on the street this morning.

Q. You passed him this morning on the street?

A. Yes sir; and he has been foreman for Anson on sidewalk work—especially this long stretch built here on Central avenue.

Q. Now, could you favor us with the name of this man?

A. No, I can not; I just know his face, and know that he is one of Mr. Anson's workmen—the little Swede that you have referred to is Mr. Anson's brother.

Mr. FIELD: I did not know what his name is—he is not a Swede, he is a Dane.

Q. Well, I do not care about that; have you got a photograph of him?

A. No, he was not on this work.

Q. Well, Mr. Anson did have a foreman there in charge of that work, and you took his picture but you did not take his name, and you cannot tell us his name.

A. Well, I was not taking the view to get his picture; I was simply taking a view of what was going on and I happened to remember, that is, where he stood.

Q. Well, if Ed Steiner says that he was the foreman for Mr. Anson and in charge of that work in removing the debris, and that when the debris was removed the foundation wall of the—

188 the foundation of that Ruppe wall was found in place, he tells what was not true, does he?

Mr. WOOD: I object to that as improper and as asking this witness to weigh the testimony of some other witness.

The COURT: Sustained.

Mr. FIELD: Exception.

Q. Now, when was the foundation of the adobe wall on lot number one removed?

A. That was taken away sometime before the fall of the Ruppe wall.

Q. How long a time before?

A. I will have to answer that by stating the time that I was there during the first survey, and that the foundation was gone when I came back—which was some two weeks before, or more. I was out then for about two weeks in June and came back the last week in June, and the wall was gone then.

Q. The foundation stones under the adobe wall on lot number one then—on the west side of lot number one, had been taken away before the last week in June?

A. Well, they were taken away before I got back, which was a few days before its fall, and that was the last week in June.

Q. Now, when the foundation stones of the adobe wall on lot number one were removed, it exposed the foundation stones of the east wall of lot number two, did it not?

189 A. Yes, sir; if I may have that view I can show you just how it appeared.

Q. Which view is that?

A. One of those.

Q. You can tell me just how it appeared: I want an answer to this.

A. It appeared in this way, that it showed the foundation stones of the Ruppe wall.

Q. That is just what I am asking you: from the time the foundation stones of the west adobe wall on lot number one were removed, the foundation stones under the Ruppe wall were exposed all the way back, is not that so?

A. Yes sir.

Q. How deep was that foundation in the ground?

A. Why, I think it was—the foundation wall was of a depth something over two feet—might have been three feet.

Q. Well, do you remember whether it was two or three feet?
A. It was over two feet.
Q. That is below the natural surface of the ground?
A. No.
Q. Well, where was it with reference to the natural surface of the ground?
A. I have reference to it as it appeared when exposed.
Q. Where was the natural surface of the ground with reference to the sidewalk?
A. Well, it was some two feet, and in places, three feet below the sidewalk.
190 Q. And this foundation that you talk about two or three feet deep, was in the ground two or three feet, or built on top of the ground two or three feet?
A. Well, I should have said the height of the foundation; it was that deep in the ground.
Q. Well, then, I wish you would tell the jury whether or not the Ruppe wall stood on a foundation of stone which was about three feet high and which began about the natural surface of the ground.
A. No, I have not stated that: the foundation was some in the ground, but the amount of silt, or rather, loose earth along that street would indicate that it was set deeper than it really had been, but that the foundation itself was about three feet in height and I think less than a foot in the solid ground, but that the level or surface of the foundation was somewhat below the level of the sidewalk.
Q. That is, the top of the foundation was somewhat below the level of the sidewalk?
A. Yes, sir.
Q. How much, Mr. Ross, can you tell?
A. Well, it may not have been over eight inches—ten inches—no more than the depth of the joists of the building.
Q. I take it that you mean, when you say it may not have been, that your best recollection is that it was about that.
A. That is my meaning.
Q. Now then, as I understand you, the adobe wall of the Ruppe building stood on a substantial stone foundation, which was
191 about a foot in the ground—in the solid ground and extended above the solid ground perhaps two feet.
A. That is as I remember it.
Q. You saw this foundation under the adobe wall on the west line of lot one, before it was removed, didn't you?
A. I saw the part that was exposed, yes sir.
Q. I mean now, the foundation on lot number one—the west wall of lot number one.
A. Oh, I beg your pardon. On lot number one—I think I saw—I think that the floor joists of that building had been removed when I was making the first survey, but the wall was only partly down at that tme.
Q. What I want to know is now, Mr. Ross, yes or no, whether or

not you saw the foundation stones of the adobe wall on the west line of lot number one, before they were taken out of the wall.

A. Well, I cannot say that I noticed them. I think that I must have seen them, because I was working in the lot right along side of the wall.

Q. Can you tell us what character of stone the foundation was?

A. No, I can not.

Q. You do not know whether it was red sandstone?

A. No, I do not.

Q. Do you know what the quality of stone that was in the foundation of the east wall of the Ruppe building was?

A. A good deal of that was red sandstone.

192 Q. A good deal of it was red sandstone?

A. Yes sir.

Q. Was all of it red sandstone?

A. Well, I cannot say to a certainty that all of it was—I remember seeing a good deal of red sandstone there as they took it out.

Q. Do you remember, when you went along there about two o'clock on the afternoon of the day that the wall fell, you looked for stone of any kind, and whether you saw any there?

A. You mean along the line of lot one?

Q. Anywhere on lot one.

A. Why, yes, I saw a good deal of stone on lot one. It was piled along the sidewalk—building stone—in readiness for future use.

Q. Well, what is on the sidewalk is not on the lot; I am asking you if you saw any stone on the lot.

A. I beg your pardon; I think I did see some stone on the lot—part of the wall was on the lot—had been constructed—some loose stones along the line of this hip of earth that was left.

Q. You think that in the afternoon at two o'clock, there were loose stones along the line of that hip of earth left there?

A. I think so.

Q. Now, Mr. Rose, you testified this morning that the wall lay as though it had buckled about two or three feet from the foundation. Do you remember to have said anything about the wall having buckled two or three feet from the foundation, at the previous trial of this case?

A. I think that I have.

193 Q. Whether you have or not, you have now no doubt that that is the fact, from the way the wall lay?

Mr. Wood: If the Court please, I think that that question is objectionable, and we object to it on the ground—I think it is calling for a speculation on the part of the witness.

The Court: I suppose it was meant to apply to what he had said: now, if that is the intention of the question, I think it is admissible.

Mr. Wood: In answer to my questions, the witness did say buckled—he said, as though it had.

The Court: Yes, I think he said so.

Mr. Wood: We submit that is not proper cross-examination, and is calling on the witness for expert testimony.

Mr. Field: He took the stenographer's notebook and demonstrated how it laid.

The Court: I will overrule the objection.

A. That is my opinion of it. The more I think about it, the more satisfied I am that that was the way in which the wall fell.

Q. Mr. Ross, when you spoke of this foundation not having been in place, do I understand you to say that no part of the foundation was in place?

A. No sir.

194 Q. Was any part of it in place?

A. I was not there when the wall was removed from over it—that is—the broken wall, and there were only a few of the bottom stones lying in place. In places a single stone only, and other places perhaps a couple of them laying one above the other—no depth left to the foundation.

Q. Was there a continuous line of stone?

A. No sir.

Q. Was there any stone in place at the place where the wall broke?

A. No, I think those stones were all in the pit at the fifty foot point—when the wall broke that had gone right down into that pit.

Q. Now, you have already testified that that excavation back at fifty feet was not over the property line of lot one—didn't encroach on the line of lot number two—have you not?

A. I do not think that I have, exactly that: I think I testified that it was up to the line of the Ruppe wall or approximately so, but I was looking at it broadside, and could not say the first time if it was over the line or not.

Q. Have you not testified—did you not testify this morning that after the debris was removed, that the fact was disclosed that the excavation was not over the property line?

A. If I did so, it was unintentional: I do not remember that I did.

Q. What was the fact about it? Was it over the property line or not?

A. I think it was a little over the property line, for this reason——

195 The Court: He is not asking you for your reason.

Q. I asked you whether it was or not; I did not ask you what you thought—did you measure it to find out if it was over the property the line.

A. If the Court please, I can tell him how I think it was over the property line.

Q. I asked you if you measured it to find out if it was over the property line.

A. I did, in one sense?

Q. Well, in what sense?

A. In the sense as I have explained before, that in setting the boundary line between those two walls, the Ruppe wall at Railroad

avenue was two and one-half inches west of the line between the two lots—now at ninety feet back, the Ruppe wall and what remained of the brick wall, on the Barnett lot, came together, so that the Ruppe wall, which was practically a straight line from point to point, would be approximately an inch west of the property line at fifty-three foot point.

Mr. FIELD: I ask to strike out the answer as not responsive, and as showing that he did not measure it, instead of showing that he did.

The COURT: Has the witness finished?

A. No. I stated that for this reason—that because of those two walls coming together, I could not see through the entire line from street to alley, with the instruments, and for that reason, I did not measure it at this exact point.

198 I ask to strike this all out.

The COURT: Overruled.

Mr. FIELD: Exception.

Q. There was nothing to prevent you from measuring it at that exact point after the wall fell and after the débris was removed?

A. No sir.

Q. And you didn't measure it at that point?

A. I did in this way: I measured across to get the fifty feet distance from Second street when I was making the second survey, and checked that as I went by it—that is all—I didn't make any point there for it—didn't have any occasion to then.

Q. Now, don't you know, Mr. Ross, that on the first trial of this case you didn't tell anything about an excavation at the fifty foot point at all?

A. I do not remember about it.

Q. Now, you say these excavations were a certain depth: do you mean below the natural surface of the ground or below the sidewalk, in giving these depths?

A. I am reckoning from the grade—the sidewalk grade at that point.

Q. How deep was the excavation at the fifty foot point?

A. I reckoned it to be between five and six feet.

Q. Does that mean that you measured it and found it to be between five and six feet, or that you guessed at it?

197 A. No, I measured it with a small steel rod banded in foot lengths—alternate colors, and it was between five and six feet, as near as I could judge they had got—the bottom of the excavation.

Q. You could not tell whether you got to the bottom of the excavation or not, then?

A. I could within a few inches—there was some loose dirt there.

Q. Between five or six feet from the top of the grade to the bottom of the excavation?

A. You mean——?

Q. The street grade?

A. Yes sir.

Q. Well, was it nearer five or nearer six feet?

A. It was apparently—as I held it there, it was on the six foot color, and I could not say within a few inches, now.

Q. Was it below the bottom of the foundation?

A. Was the excavation below the bottom of the foundation?

Q. Yes.

A. Certainly.

Q. How much?

A. Oh, I think two feet, or more.

Q. The grade was two feet above the natural surface of the ground, the foundation was three feet high, set one foot in the ground, so that made five feet from the level of the grade to the bottom of the foundation, didn't it?

A. Approximately.

Q. Now, you think it was two feet below that?

A. No, you are mistaken there.

198 Q. You just said so, didn't you?

A. No.

Q. What did you say?

A. I said the bottom of the excavation was probably two feet below the foundation.

Q. Below the bottom of the foundation?

A. Yes sir.

Q. You still say that, do you?

A. Yes sir.

Q. And you say that the grade was two feet above the surface—the natural surface of the lot, and the foundation was three feet high set a foot in the ground, and the excavation was two feet below the bottom of the foundation, and the bottom of the excavation was between five and six feet from the top of the grade?

A. I cannot figure it out on that basis.

Q. I didn't suppose you could.

A. The excavation was two feet or more below the bottom of the foundation——

Q. Very well.

A. Add three feet of foundation to the two feet of excavation and you have approximately five feet.

Q. Yes——

A. Very well. The top of the foundation still lacked a few inches of coming to the street grade, because I have already stated that the floor joists which were at least eight inches in width—depth, rested on the top of this foundation: so I think if you will figure it out by the ordinary multiplication table, you will find that is between five and six feet below the street grade.

199 Q. You make those figures by the multiplication table? That is the way they look to me—that you make them.

A. Yes sir.

Q. That will do, Mr. Ross.

Redirect examination by Mr. Wood:

Q. Mr. Ross, you were asked by counsel concerning your testimony in this case, particularly upon the second trial, as to whether

or not you testified on that trial that the excavation along the northeast corner of the wall had extended under the wall, and counsel read to you from the record some of your testimony given upon that trial: what is your recollection whether or not you gave other testimony upon the point, on that trial, other than what the counsel read to you—additional?

A. I am not very clear, but I think there was other testimony concerning that point.

Q. Allow me to refresh your recollection by calling your attention to testimony in the record on pages 109 and 10; were you not asked the following questions upon that trial, by Mr. Field, and did you not make the answers which I will read to you? Q. "Did you see the stone foundation of the Ruppe building at the northeast corner when you passed there at two o'clock?" A. "Yes, sir." Q. "What was holding the stone up?" A. "There was nothing outside of that." Q. "They were just hanging there in the air, with nothing under them?" A. "I say, nothing outside of them: I did not say nothing under them." Q. "What was under them; that is what I am asking you?" A. "Oh, there was more or less of the different classes of soil: as I say, first silt, then the adobe—kind of slanting down under the wall." What is your recollection as to whether you didn't so testify, upon the second trial?

200

A. That is correct.

Q. Mr. Ross, I show you the picture which you referred to during your cross-examination by Mr. Field: did you take that picture yourself?

A. No sir.

Q. And was it taken in your presence?

A. It was.

Q. By whom?

A. By my nephew, Edmund Cobb.

Q. Now, put a mark under the picture of the man you say you understood was foreman of Mr. Anson there at that time.

A. (Witness making mark on picture.) I have put a cross in the shadow.

Q. What was the man doing that is shown in the picture, under which you put the letter X?

Mr. Field: You mean at the time the picture was taken?

Mr. Wood: There or thereabout: I want to find out what his duties there were.

A. He was directing the teams where to come to load, and the men where to work.

Mr. Wood: We offer the picture in evidence in connection with the cross-examination.

Mr. Field: I object to the picture—the picture was introduced for the purpose of giving us the identity of the man by the witness, and not for any other purpose, and we expect to produce the man, and that will be better than the picture.

201

Mr. Wood: The inference was that it was Mr. Steiner who was

the foreman: I want to disassociate him from this picture when he comes on.

The COURT: I do not see why you should introduce it now.

Mr. WOOD: The difficulty is this, Mr. Ross may not be here, he says he must leave.

Mr. FIELD: He said this is not the picture of Ed Steiner.

The COURT: He said he saw the man this morning. I think I will admit it; I see no harm, because Mr. Ross is going away.

Mr. FIELD: I do not think that the fact that Mr. Ross is going away should change the rules of evidence.

The COURT: I do not think it does. I think it is admissible, but it might be partly admitted in rebuttal, if it becomes necessary.

Thereupon the picture referred to was marked Plaintiffs' Exhibit G. (inasmuch as it is impracticable to incorporate the said picture heretofore marked plaintiffs exhibit G in this bill of exceptions, the same is ordered to be transmitted by the clerk of this court to the clerk of the Supreme Court of New Mexico as a part of the
202 record in this cause.)

Mr. WOOD: That is all.

JAMES MCCORRISTON, introduced as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. WOOD:

Q. State your name?
A. James McCorriston.
Q. Where do you reside?
A. I live at Albuquerque.
Q. How long have you lived here?
A. Pretty near twenty-seven years.
Q. What has been your business?
A. Doing cement work, at present.
Q. Are you familiar with lots one and two in block sixteen of the plat here—which was formerly—upon which Joe Barnett built his new building?
A. Yes, sir.
Q. And do you remember the conditions, and the buildings that were upon that lot before the present structure was built on it?
A. Yes, sir.
Q. Do you recollect the condition of the wall just immediately prior to the time the wall of the Ruppe building fell there?
A. Yes, sir, I remember some of the conditions.
Q. Now, when did you last notice the condition of that lot next to the Ruppe building, prior to the time the wall fell?
203 A. I was looking at it the afternoon of the day that it fell.
Q. And how long before it fell, do you recollect—about what time in the afternoon?
A. Just after dinner, along about two o'clock, when I was going from my dinner to work.
Q. Now, what work, if any, did you see being done upon the lot just adjoining the Ruppe building, at that time—the corner lot?

A. The big part of the excavation was made and the wall on the east side was pretty nearly completed, and they were starting the wall on the west side.

Q. You say the wall was pretty nearly completed on the east side, do you mean the stone work?

A. The stone work, yes sir.

Q. And you said they were starting the wall on the west side, what were they doing there?

The COURT: Did he mean the west side?

A. The wall on the east side was about completed, and starting the wall on the west side.

Q. The west side being the wall along the Ruppe building?

A. The Ruppe building, yes sir.

Q. Now, what were they doing along the next to the Ruppe building, at that time?

A. Digging the piers and getting the stone over, preparatory to putting in the piers.

Q. Did you notice whether or not any of the stone wall was actually constructed on the north side, along Central avenue, at that time?

204 A. I did not notice.

Q. Did you notice the men working up there in the northwest corner of the first lot—the corner lot, at the time that you have mentioned?

A. There was no men working there that day when I happened past.

Q. Tell us, Mr. McCorriston, just what you noticed in regard to the extent of the excavation up there in that corner—the front corner on Central avenue, next to the Ruppe building—describe it in full.

A. I noticed a pier hole dug possibly five feet long and three feet wide—two and one-half or three feet—and eight feet deep, and then a- -butment left of some five or five and a half, and then another pier hole dug, that looked to be about five feet—that is, five feet long.

Q. Describe more in detail this first pier hole, as to where the west line of it was, where it went with reference to the Ruppe building.

A. The west line of it, or the west wall of it, was ten or fourteen inches "an under" the Ruppe building.

Q. What was holding the wall of the Ruppe building up at that point, if anything, under this excavation?

A. The foundation was wide—wider than what the hole was, and the stone under the joists—the west layer of the stones apparently was holding up the joists.

Mr. FIELD: You don't mean the west layer?

A. I mean the west—it was made of smaller sized stones,

205 say eight or nine inches—the first layer of stone was fallen off—the east layer of stone and the other were intact.

Q. What did you notice in regard to that second excavation as to the five feet that was left between the two? What did you notice as to the extent of that second?

A. It was another pier of earth left there, and a third pier apparently started—that is, a third hole.

Q. Third hole: what is your recollection as to how much work had been done on the second hole, and what position was it in?

A. I stood on the sidewalk—the second hole looked to be—the excavation complete, but there was no stones laid in any of the piers.

Q. Did you notice whether or not the second hole was extended under the wall?

A. It extended under the wall, but I do not know whether it went the ten or fourteen inches or not.

Q. Did you notice any hole or excavating done about the point where the wall finally broke down?

A. The excavation did not appear to be as nearly done down that way as it was above. I was standing on the sidewalk, expecting to put in the floor, and I was inspecting and seeing how much water we would have to fight.

Q. You didn't see the building at the time it fell?

A. No, I was standing, after supper, down at Sturgess's and seen the dust and just ran up—I was not there when it fell.

206 Q. About what time was it, if you recollect, when it fell?

A. About six, I think—six in the evening.

Q. Now, you say there were no men working there: where do you mean, nowhere in the cellar or right up at the point of the pier that you mentioned?

A. I never noticed the men, I was watching for water in the pier holes.

Q. I think you stated it was about two o'clock or three o'clock in the afternoon when you saw that?

A. When I passed, yes sir, about two o'clock, think, between two and three in the afternoon I passed down the street.

Mr. Woods: ——.

Cross-examination by Mr. MANN:

Q. You say no men were working there at that excavation when you passed?

A. There was nobody digging or laying stone.

Q. The men were not at work?

A. Well, they might have been at work on some other part of the cellar, I didn't notice.

Q. But I mean at this excavation, at the corner.

A. No, I did not see anybody.

Q. And there was nobody in there at all at two o'clock?

A. I didn't see anybody in there.

Q. And were there any men working at the second excavation—second pier?

A. Didn't see anybody along there.

207 Q. Now, what called your particular attention to this, I believe you stated at the other trial, was that you were looking to see if there was any water in this excavation?

A. Trying to see if I was going to have much water to fight, if I put in the floor, that was all the business I had there.

Q. You were going to put the floor in this cellar in the Barnett building?

A. I expected I would.

Q. You didn't have the contract—just had the hope?

A. I just had the hope, I didn't have the contract.

Q. I suppose your hopes depended largely upon whether there was any water there or not?

A. It would make a difference in my figures.

Q. Well, was there any water there, Mr. McCorriston?

A. No, no water to speak of—no water to scare a fellow.

Q. Was there any water at all?

A. I don't just know now. The pier was deeper than my floor went.

Q. You don't remember, really, whether there was any water there, or not?

A. I remember that the floor was to be about seven feet—the pier hole was eight feet, and the water didn't come up high enough to scare me any on the floor.

Q. But you cannot remember whether there was any at all?

A. I do not remember whether there was any at all at the eight feet.

Q. That has been a good while ago, has it not?

208 A. That was a good while ago.

Q. I suppose your memory is not as clear with reference to those excavations now, as it was when you testified here at the first trial, is it?

A. Well the pole marked one foot on it—it was standing in the hole at the northeast corner, with figures on it, and I saw that was down eight feet, the full depth, I knew the foundation had to go down eight feet.

Q. Did you go any nearer to the second excavation than the sidewalk?

A. No.

Q. Were there any stone—had any stone been taken into that excavation?

A. Yes, there was considerable stone lying over what would be afterward the cellar floor—considerable stone tumbled in there.

Q. Do you remember what kind of stone that was?

A. Mountain rock.

Q. Well, was it red sandstone?

A. No, it was mountain rock.

Q. And this second excavation, you don't know just how deep that was?

A. I do not know how deep the second excavation was. I think it was finished.

Q. Could you see the bottom of that from where you were?

A. No.

Q. You say between the two excavations was a bank of earth, or pier of earth?

A. Pier of earth.

Q. And about how wide was that pier of earth?

209 A. Well, between five and six feet along lengthwise.
Q. And how wide was it at the top?
A. Well, it stood at possibly a foot or eighteen inches east of the Ruppe building.
Q. That soil is pretty sandy there, is it not?
A. Sandy when you get down through the top skin.
Q. There is a course, as I understand it, of adobe dirt, and under that it is sand?
A. Yes, sir, sand.
Q. So that when you dig down into the sand it will naturally crumble and fall away?
A. It falls away.

Mr. MANN: I think that is all.

Cross-examination by Mr. FIELD:

Q. That shoulder of earth that you spoke about, extended all the way back along the wall?
A. It extended until it met the next pier hole.
Q. How many pier holes did you see there?
A. Well, I saw three.
Q. Is that all?
A. There might have been another one started, but I do not remember it.
Q. Then if the shoulder of earth extended all the way back——
A. The cellar was not excavated as deep at the back as it was towards the front, consequently you couldn't tell much about the shoulder.
Q. Where there was no shoulder there was the balance of the earth?
210 A. Yes.

Mr. FIELD: That is all.

A. W. HAYDEN, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. WOOD:

Q. What is your name, place of residence and occupation?
A. A. W. Hayden, reside at Albuquerque, contractor and builder.
Q. Do you know the location of the lots in question in this suit?
A. Yes sir.
Q. And did you notice the excavation on the corner lot in June, 1902, before the walls of the Ruppe building fell?
A. Yes, sir.
Q. Do you remember the day on which that wall fell—the occasion I would say.
A. Yes, sir.
Q. Now, on that day, state to the jury what you observed as to the amount of excavation on lot one.
A. The excavation appeared to be deeper at the northwest corner of lot one—right at the—commencing at the sidewalk, going down

something over possibly seven feet or a little more—over a man's head—seven feet deep, not seven feet over a man's head; as a man stood there it was a little over his head—running back along
211 the line between the two lots in question about six feet, leaving a pier of the original earth, and beginning another excavation four or five feet wide on the same line along the line of the lot—that excavation, I do not think, was as deep as the one at the sidewalk. The foundation stone under the Ruppe wall was exposed for eighteen or twenty feet along that line, standing on the sidewalk, and looking down into the first excavation the ground or the digging was slanting in under—at the bottom (witness indicating by motion of hands).

Q. To what extent, Mr. Hayden, did it go under?

A. At the bottom perhaps it was—of course the loose sand kept—would keep falling out—perhaps a foot.

Q. Did you observe to what extent the second hole was under the building?

A. No sir, I did not.

Q. You say the foundation was exposed. To what extent was it exposed for that eighteen or twenty feet?

A. All of the dirt that was—that had been along by it—had been removed.

Q. Could you see the bottom of the stones of the foundation along that distance?

A. Yes, sir.

Q. What time of day was it that you saw that?

A. Nearly four o'clock in the afternoon.

Q. Did you observe any work being done in lot one, the corner lot, at that time.

A. Yes, sir.

212 Q. And what did you see being done, in the way of excavating? What did you see being done?

A. There were two men working up near the sidewalk, excavating, working, digging.

Q. Was that all that you saw?

A. At that particular corner?

Q. Anywhere on the lot.

A. There were other men working and teams hauling out dirt in the rest of the lot.

Q. Now, how many excavations did you say you saw, looking along the lot next to the Ruppe building?

A. There were those two—that were of any size—then I think perhaps the third one started—not much done in the third one.

Mr. Wood: That is all.

Cross-examination by Mr. Mann:

Q. You say it was about four o'clock in the afternoon when you passed there on the day that the wall fell?

A. Yes, sir.

Q. Do you think that excavation in the corner could have been as much as eight feet deep, Mr. Hayden?
A. I put it about seven feet.
Q. I know you did, but do you think it could have been as much as eight feet deep?
A. Well, it appeared to be something over the men's heads, as they were working there.
Q. But in your best judgment it was about seven feet deep?
A. Yes, sir.
213 Q. And that was about four o'clock in the afternoon?
A. Yes, sir.
Q. Now, you say that first excavation at the bottom extended under that wall perhaps a foot?
A. About a foot, yes sir.
Q. Well, that corner there is sandy, is it not—sandy soil?
A. Yes, sir.
Q. That is, I mean as you get through the top course of earth?
A. Yes, sir.
Q. And that loose sand, is it coarse sand?
A. Loose sand.
Q. In digging in that kind of sand, it will naturally crumble and fall from the straight line, will it not?
A. Yes, sir.
Q. And the length of that place for the pier in the corner, that you spoke of, you say was about five feet along the Ruppe wall—something like that?
A. Between five and six feet.
Q. And then what was there?
A. A bank of dirt.
Q. And that was the natural dirt left standing?
A. Yes.
Q. And how wide was that from the Ruppe wall, toward the east at the top, say?
A. Oh, about three feet.
Q. And did it slant down, or was it straight down?
214 A. Slanting.
Q. So that at the bottom it was considerably wider than—I mean at the bottom of the cellar——
A. The bottom part slanting to the east, I mean—that is what you mean?
Q. Yes: so that the pier of earth was wider at the bottom of the excavation than at the top.
A. Yes, sir.
Q. Now, you say there was another excavation east, or along the wall south from the first excavation?
A. Yes, sir.
Q. The first excavation was about five feet at the corner, then this five feet of earth that you spoke of?
A. Yes, sir.
Q. And then another excavation?
A. Yes, sir.

Q. And about how long was that along the wall, Mr. Hayden?
A. About five feet.
Q. Did it appear to be as deep as the one at the corner?
A. It didn't appear to be so deep, no.
Q. Did it appear to be a finished pier, or place for a pier?
A. No, sir.
Q. And then beyond that there was another pier of earth, was there? Or did it extend pretty well all along?
A. There appeared to be more or less of the earth taken off from that, but a third one started four or five feet from that.
215 Q. How deep did that third one appear to be, Mr. Hayden?
A. Perhaps two feet below the foundation.
Q. Do you mean below the bottom of the foundation, or below the natural surface there?
A. Below the natural surface.
Q. Did that extend under the wall, that third one?
A. No, sir.
Q. I believe you said the second didn't extend under the wall?
A. The second didn't appear to slant in at the bottom as much as the first.
Q. Now, you say the foundation of the wall of the drug store was exposed along there for a number of feet, quite a ways from the front, back?
A. Yes, sir.
Q. And how long had you known that property, Mr. Hayden?
A. Since during the time Mr. Ruppe went in there.
Q. Well, is it not a fact that there had just been a wall and foundation removed, that was directly right against this wall?

Mr. Wood: We object to that, as not cross-examination.
The Court: I think it bears upon his knowledge of the situation. The objection is overruled.
Mr. Wood: Your Honor will note that I confine my questions to him as to the day of the injury.

A. Yes, sir.
216 Q. And is not that the reason that the foundation was exposed along there?

Mr. Wood: I object to that as calling for a conclusion of the witness, and not proper cross-examination.
The Court: Objection overruled.
Mr. Wood: We except.

A. The dirt was below the foundation: The original dirt was several inches below that foundation all along there.
Q. And that is what you mean when you say that the foundation was exposed: you mean the part of the foundation that was above the original surface of the ground?
A. Was exposed several—six or eight inches—down.
Q. You didn't mean to convey the idea that the earth was removed below the bottom of the foundation of the Ruppe wall along there?

A. In, under, you mean?
Q. Yes.
A. No; only at the piers where the excavation was made.
Q. I mean for this distance that you say the foundation was exposed?
A. No, sir, straight.
Q. And all along there where this foundation was exposed, as I understand you, was a bank of earth to the east of the wall, except where it had been cut into for those piers?
A. Yes, sir.
217 Q. Did you make any close inspection of that excavation at the corner of what you just—you had no particular object, had you, in looking at that place?
A. Yes sir, I had.
Q. Then you examined it pretty closely?
A. I examined it for the purpose of learning something.
Q. You are a contractor and builder, yourself, I believe?
A. Yes, sir.
Q. So that your examination of those excavations was something more than a mere casual glance at them? You were looking at them as a man in the same business, to learn something of that class of work?
A. Yes, sir.
Q. And having had considerable experience in that line of work, you ought to be able to judge pretty well as to the depth and kind of excavations that they were, don't you think?
A. Yes, sir.
Mr. MANN: That is all.

Cross-examination by Mr. FIELD:

Q. Mr. Hayden, how far back was the last excavation that you saw along the side of the Ruppe wall, or Ruppe lot, apparently, for a pier.
A. About twenty feet.
Q. Back of that excavation was the earth in place: back as far as the Ruppe wall extended?
A. There were teams hauling the dirt out at the rear end of the lot.
218 Q. That is, at the rear of the lot there was a slant such as you usually get for purposes of excavation—making a place for teams to go out?
A. Yes, sir.
Q. And from that excavation from the twenty feet back, the earth was in place?
A. They had been hauling dirt away there for several days, on the whole lot.
Q. All the way back?
A. Yes, sir.
Q. There was no arm of earth left next to the Ruppe building?

A. Just about the shape of the dirt I am not prepared to say, at that place, Mr. Field, but they were hauling out of that lot one.

Q. Well, it is impossible to excavate right up to the lot line and haul out, is it not? You have to leave a bank of earth?

A. Yes, sir.

Q. And that bank of earth was there all the way back from the twenty foot place, is that the fact?

A. (Witness not answering).

Q. Don't you understand that I am asking you a question?

A. Yes, sir.

Q. Is that answer Yes, sir, to the bank of earth, or that you thought I was asking you a question: was that bank of earth there from the twenty foot line back, or not?

A. There was some taken off of it.

Q. How much had been taken off?

A. Perhaps a foot and a half.

219 Q. You mean a foot and a half from the lot level?

A. Yes, sir.

Q. All the way across?

A. There was more taken out towards the east line: they had been hauling away there for several days.

Q. You mean toward the east line of lot number one, or lot two?

A. Of lot number one.

Q. That is just what I am asking you now, Mr. Hayden, if it is not true that the excavation on that lot for the cellar necessarily left a bank of earth from the twenty foot place that you have described, back next to the Ruppe wall and the excavation, and the dirt hauled out on that side?

A. Yes, sir.

Q. And back from the twenty foot line—back, there was more earth next to the Ruppe lot than there was any other place on the lot?

A. Yes, sir.

Mr. FIELD: That is all.

Redirect examination by Mr. WOOD:

Q. Mr. Hayden, I think we are not quite clear upon what you mean by the foundation being exposed in front: was the dirt removed from the side of the foundation clear up flush with it at the front for twenty feet, or more?

Mr. MANN: Objected to as leading.

Mr. WOOD: I think it is not entirely clear.

220 The COURT: Objection sustained. I suppose what you want to know is whether the natural surface of the earth had been lowered against the foundation.

Mr. WOOD: That is it, exactly. That is what I think the question asked for.

The COURT: If he can, he can tell that.

A. Yes, sir.

Q. And that commenced where—well, you have already stated, I think, that it was at the corner where the pier was dug out: now how far back from that corner could you see the whole foundation?

Mr. FIELD: We object to this as not proper re-direct examination.

The COURT: Objection overruled.

A. About twenty feet.

Q. Now, how far did you observe at that point that the foundation extended down below the natural level of the ground?

Mr. FIELD: Objected to as leading.

The COURT: Overruled.

Mr. Field: Exception.

A. You mean beyond the twenty feet?

Q. No, for that twenty feet, how far the foundation had extended?

221 The COURT: How far was the bottom of the foundation from the natural surface of the ground?

A. About a foot—one foot.

Q. So that about a foot of the earth had been removed from that foundation wall, clear up—twenty feet back?

Mr. FIELD: Objected to as leading and suggestive.

The COURT: Objection sustained.

Q. And how much, if any, dirt had been removed for that twenty feet back, and how close to the foundation wall had it been removed?

A. The pier at—the excavation for the pier at the northwest corner of lot one——

The COURT: He has described the pier holes. Now the space between the pier holes, you want to know how much had been taken off the natural surface, if any—how much in depth?

Mr. WOOD: Yes, sir.

A. About one foot.

Q. And that had been removed out close to the stones of the foundation wall?

A. Right up to the stone.

Mr. WOOD: That is all.

Recross-examination by Mr. MANN:

Q. Do you know whether or not that was done in removing the foundation of the other wall that had just been removed?

222 A. There was a space between the two foundations.

Q. How is that?

A. There was a space between the two foundations.

Q. How much of a space?

A. Oh, there was a space between the two walls——

Q. You did not say there was a space between the two foundations, did you, Mr. Hayden?

A. I feel pretty sure there was.

Q. And about how much of a space?
A. About three inches.
Mr. MANN: That is all.

The hour of five o'clock p. m. having arrived, an adjournment was taken until tomorrow morning, April 1st, 1910, at 9:30 a. m.

And now on this 1st day of April, 1910, pursuant to adjournment, the trial of this cause proceeds:

ABAN SANDOVAL, introduced as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. WOOD:

Q. State your name and place of residence to the jury.
A. Aban Sandoval; Albuquerque at Martinestown—that section of the city.
Q. What is your business?
A. I am an adobe contractor—in adobe and stone work.
223 Q. And how long have you been engaged in that business?
A. I think that since 1883 or 1884—about that time.
Q. And have you lived in and about Albuquerque during all of that time?
A. Yes, sir, all the time.
Q. Do you know Mr. Ruppe, the plaintiffs—one of the plaintiffs—and Mr. Barnett and Mr. Weinman?
A. I know all three of them very well.
Q. Do you know the location of the lots that are in controversy in this suit, or that are referred to in it?
A. Yes.
Q. And do you remember the time when the wall of the Ruppe building fell?
A. Yes, sir.
Q. Where were you at the time that it fell?
A. I was setting on the corner on the east side of the new Barnett building, as it stands now.
Q. That was on the corner of lot one, and the Ruppe building, the wall of which fell, was upon the next lot, or lot two, was it not?
A. Yes, sir.
Q. Now state to the jury Mr. Sandoval, just what you saw, beginning at the time when you first went there on that day, with regard to the workmen in the vicinity excavating, or otherwise.
A. I was working on that day near the park, and I stopped working about five o'clock or near five o'clock, and I went up town and when I arrived at lot number one then I stood on the corner
224 of said lot to look at the men that were working inside of that lot. Then I set there for a short time and I looked up toward the top of the wall and I saw that the wall gave way from its place; there was dust issuing from the wall and small pieces of adobe rolling down; then I told a great many that were there present, that wall is going to fall——

Mr. FIELD: I object to that and ask that it be taken from the jury.

Mr. WOOD: We did not ask for what was said, Mr. Sandoval; tell the jury what you saw. We consent that may be taken from the jury.

The COURT: The jury will not consider what he said to other people; he was only asked what he saw and heard himself.

A. (Cont.) Then the men that were near the house excavating close to the wall, they ran towards the south—south part of the lot—when they noticed that the wall was giving way. Then I went inside of Mr. Ruppe's drug store and I told him to tell the people in the [illegible]go out, as the house was going to fall and I told him—look at the wall where it has parted already—it is going to fall: then in a few moments he asked me whether I had seen Mr. La Driere, the architect.

Mr. FIELD: I object to what was said between this man and Mr. Ruppe about Mr. La Driere.

Mr. MANN: And not said in the presence of either of the
225 defendants.

Mr. WOOD: I think this would be proper as part of the *res gestæ*, but I do not think it is important.

The COURT: Leave out what was said between you and Mr. Ruppe.

Mr. FIELD: I do not object to what was said between him and Mr. Ruppe, or what Ruppe said to him about the building; that is *res gestæ*, but what he said to Mr. Ruppe about La Driere we do object to.

Mr. WOOD: If it is *res gestæ*, it covers the whole conversation.

The COURT: I think he will have to go on and tell his story, and I will strike it out if it is objectionable and not connected.

Mr. FIELD: We except.

A. (Cont.) Mr. Ruppe asked me if I had seen Mr. La Driere or Mr. Caesar Grande, then I told him I had not seen them. In about ten minutes they appeared there—before they came, the wall that is on the window facing on the north commenced to break up and commenced to fall down toward the sidewalk, and the wall fell down—sliding down to the cellar—a portion inside of the cellar and the rest of it fell inside of the drug store—the roof resting upon the adobes of the wall that had been broken up—only the fire wall
226 remained on top of the roof.

Q. Now you say you saw the men who were along the bottom of the wall running away after the adobes and dirt began to fall down: what were those men doing there at that time, if you noticed?

A. These men were working close to the corner on the north side. There was a string of men—about six men, which I think now I can remember the names of some of them, and they were working near the corner, and they were partly not working near—more near the wall that was standing of Mr. Ruppe's there—the wall that was standing where Mr. Ruppe's was, right on the corner of the house there was a stone that fell down—had fallen down—on the north

side, and when that stone fell and the wall commenced to give away then those men rushed toward the south portion to await the fall of the wall, because they were excavating further down toward the north and the ground was higher up to the place where the wagons would turn around, and the depth of the cellar was about six feet, I think, when the wall fell down.

Q. You say that a stone fell. Describe that more particularly; where did it fall from, if you saw it, and what kind of a stone was it?

A. It was one on the edge of the sidewalk—on the edge of the foundation—the rock fell from there.

Q. The foundation of the Ruppe building?

A. The rock was so situated that possibly it rested on both the foundation of Mr. Ruppe and also the house belonging to Mr. Barnett, because they were excavating in a slanting way and it
227 must have been about six or eight inches inside or under the wall of Mr. Ruppe.

Q. Then this rock which you say you saw fall was a part of the foundation under the Ruppe building: was that what I am to understand you to say?

Mr. FIELD: I object to that as leading.

The COURT: Sustained.

Q. I do not understand from your answer whether you mean to say that the stone which you have described was in the foundation wall or was a stone—a loose stone upon the outside, resting in part on the two lots: will you please explain that and clear it up for us?

A. It rested very little on the sidewalk, and the greatest portion of the rock rested upon Barnett's wall and rested under Mr. Ruppe's foundation.

Q. This was a stone, and not adobe, I take it from your answer.

A. It was a sand stone.

Q. Did any of the adobes in the Ruppe wall rest upon it?

A. The two foundations were close together like this (indicating) when the two houses were built, possibly one of the two went in further from one side or the other, and that is the way it came to rest that way.

Q. At that time the walls of the building on the Barnett
228 lot were entirely removed, were they not?

Mr. MANN: I object to that as leading suggestive.

The COURT: Objection sustained.

Q. You say these men you saw were working there at the corner: what were they doing?

A. They were working there excavating for the cellar and filling up the wagons right there. There was a man named there—by the name of Dolores Anaya and Ysidro Baca, and others, they were all working there.

Q. When did you first recollect so as to be able to tell who those men were?

Mr. FIELD: I object to that as cross-examination of his own witness.

Mr. WOOD: Question withdrawn.

Q. Has the names of those men ever been mentioned here before, that you ever heard, during the progress of this trial—of these four trials?

Mr. MANN: I object to that as incompetent, irrelevant and immaterial.

The COURT: Sustained.

Mr. WOOD: We except.

Q. Did you notice particularly the extent of the excavation of that cellar right at the front corner of the Ruppe building?

A. Yes, sir, I stood there right at the corner when I got
229 there.

Q. Now, describe that excavation right at the corner of the Ruppe building, the front corner, as you saw it at that time.

A. The excavation was leaning in towards the wall of Mr. Ruppe.

Q. Can you not give us a more detailed description of that excavation?

The COURT: That is, its depth.

Q. Its depth and its width.

A. The cellar had been dug there about six feet in depth, because they were excavating from south to the north, so as to have the outlet towards the alley for the wagons, having commenced first on the north next to the edge of the sidewalk to excavate.

Q. I am trying to direct your attention more particularly to that portion right at the corner, the front corner of the Ruppe building, just in that corner.

A. That corner was excavated to a depth of about six feet, with a slant between six and eight inches inside of the Ruppe wall.

Q. Now, you say you saw some dirt and some adobes beginning to fall from the wall, at first: what point were they falling from, what point in the wall?

A. About forty feet more or less, from the south side to the north it could be seen that the dirt was moving or being loosened.

Q. The point where you saw the dirt falling down first, where was that?—pieces of adobe?

230 A. From the top of the excavation where it had been excavated, about as high as that chandelier, could be seen the little adobes rolling and the dirt.

Q. From the top of the excavation where—whereabouts?

A. Of course, they were not rolling from the excavating, but from the wall above the excavation.

Q. What point in the wall, what excavation do you mean?

A. The excavation I call for the cellar at the point where the walls was, and up above that I call the walls of the cellar.

Q. But what I am trying to get at, Mr. Sandoval, you say that you saw dirt falling from a part of the wall—dirt and small pieces of adobes: I want to get at what particular point in the wall, how far

from the sidewalk that you saw those falling, the sidewalk on Central avenue?

A. From the sidewalk, about eight or ten feet towards the south.

Q. Now, you have stated that you called Mr. Ruppe's attention to a break in the wall when you went inside: where was that break, and where did you first notice it?

A. If I am not mistaken, I testified about this matter before: it was about forty feet south, and the wall was broken in this way, more or less. (Indicating manner.)

Q. Broken up and down?

A. Straight.

Q. When did you first notice that break or crack in the
231 wall at the point which you say was about forty feet back?

A. When I looked and thought I saw the adobes roll and dirt rolling, then I cast my sight toward the wall and noted the break forming there.

Q. You say you noticed the break forming; did you see it spreading?

Mr. MANN: Objected to as leading.

The COURT: Objection overruled.

A. It was opening more and more.

Mr. MANN: We except to the ruling.

Q. Where did it commence to open, at the top or bottom or middle, or how?

A. It commenced to open from the top, because the wall was giving away toward the north.

Q. And how far apart was it when you first noticed it?

The COURT: At the top?

Q. At the top?

A. When I first noted the break it was about two inches, and in a few moments when it commenced to push itself—push the window to the north—it was opening up to about four or six inches more.

Q. Now, what was the width at the bottom of the wall, of that crack? Or did the crack extend clear to the bottom? I will ask you that first.

A. It extended to about four inches down to the foundation, but it was a great deal more up on top.

232 Q. It extended to about four inches of the foundation?

A. Four inches open at the foundation—eight or ten inches at the top.

Q. Did you see the wall as it fell?

A. Yes, sir.

Q. And where were you when the wall finally fell?

A. I was right at the corner of the lot.

Q. Now, describe to the jury just the appearance of that wall as it fell and as you saw it falling, how did it fall?

A. The wall as it was, dipped on the north side; it came down this way (indicating with hands), and fell over this way (indicating).

Mr. FIELD: This way and that way will be utterly unintelligible in the record.

The COURT: I suppose he will try to get it in better form.

Q. You say it dipped over this way—which way?

A. The wall was standing straight like this (indicating manner), and it turned aside like this (indicating manner).

Q. In what direction?

A. Pushed the window toward the sidewalk and the wall falling down in this way (indicating), and also going down the direction of the store, so (indicating).

Mr. FIELD: All of which will be absolutely unintelligible
233 in this record.

Mr. WOOD: I think part of it is all right: I will try to get it in English.

Q. Now, you say the wall first pushed the window toward the sidewalk?

Mr. FIELD: I object to the counsel leading the witness.

Mr. WOOD: The counsel wants it clear.

The COURT: If you are satisfied, leave it to their cross-examination.

Mr. WOOD: There is a point there I want to have cleared up.

The COURT: I will overrule the objection.

Mr. FIELD: We except.

The COURT: I did not understand the objection to refer to the last question.

Mr. FIELD: That was what I was doing.

The COURT: The witness had not finished—I will withdraw that ruling until counsel finishes the question.

Mr. WOOD: I will change the last question.

Q. Now, in describing the fall of this wall, you say that it pushed the window out towards the sidewalk, and then you added, and then fell this way: explain what you meant by this way—
234 whether to the north or to the east or to the west, or what you meant by this way?

Mr. MANN: What we object to is his stating that the witness testified to a certain thing: we have no objection to the latter part of the question, but we think the jury are the judges of what the witness did testify.

The COURT: I do not know whether the witness said just that.

Mr. WOOD: That is just to call the attention of the witness to it.

The COURT (To the witness): In order that the stenographer may get your testimony in words, it is necessary that you tell in words and not tell with motions of your hands.

A. I understand that, your Honor, but I can not say except to show the way that the wall fell.

Mr. MANN: We object to the last question for the reason that counsel has no right to repeat the evidence, and even though he quotes the witness correctly, it is prejudicial to these defendants to

have counsel reiterating what the testimony of the witness is, and it is not necessary in asking these questions to do so.

The COURT: I do not see how he can direct his attention to the question itself without repitition in this instance. I will overrule the objection.

235 Q. (Repeated.)

A. The wall falling inside of the cellar and the other inside of the drug store and the window towards the north upon the sidewalk.

Q. Where was this window that you speak of?

A. It was all glass—the window was all glass, facing on Central.

Q. The front of the building, you mean?

A. Yes, sir.

Q. Did you notice whether or not any portion of the wall fell upon the sidewalk?

Mr. MANN: Objected to as leading and suggestive.

The COURT: Overruled.

Mr. MANN: Exception.

A. It may be an adobe fell that way but I believe not—the glass fell in that direction.

Mr. WOOD: I think that is all.

Cross-examination by Mr. MANN:

Q. How long have you been living in Albuquerque, Mr. Sandoval?

A. I was born in Albuquerque.

Q. Lived here, then, all your life practically?

A. Yes, sir; I was born in February, 1861, on the 14th day of that month.

Q. You don't remember just what hour of the day, I suppose?

A. No.

Q. And how long have you known Mr. Ruppe?

236 Mr. WOOD: I object to that as leading.

A. I think—I understand, I know him since 1880.

Q. And you have always been friendly with him, I suppose, been pretty good friends?

A. I made a point to be friendly to all men.

Q. You never made it a special point to be friendly to Mr. Ruppe, then?

A. I *am* always be- a special friend to all men, and especially so to all those residing within the city.

Q. Have you any special friendship for drugs, or people engaged in that business?

A. No, sir; when there is a sickness in my family I get the medicine from any drug store, just the same from Mr. Ruppe as anybody else.

Q. You don't play any favorites: you patronize the drug stores without regard to whose they are, is that right?

A. No, sir, I am just personally friendly with him, the same as with any other man.

Q. But you have known him a good many years?

A. Yes, sir.

Q. Now, what time of the day was it that you passed along by that drug store on the day it fell?

A. I must have got there shortly after five o'clock.

Q. In the afternoon?

A. Yes, sir.

Q. And how many men did you say were working in that excavation?

A. I believe there were about eight or ten men, that is,
237 not counting the drivers of the wagons.

Q. What were those eight or ten men doing?

A. Some were digging with a pick and others were pushing the dug portions to one side—piling it up so that the wagons could get at it.

Q. They were scattered all over this lot there, I suppose, and taking out this dirt loading it into wagons, to be hauled off?

A. They were more working more close to the western side.

Q. And how many men were working close to the western side—that is, where this excavation was that you are telling about?

A. They were all there—digging.

Q. There were eight or ten of them, then digging right up on this western side, right next to this wall?

A. More or less, yes, sir.

Q. Well, do you mean that there were that many right in the corner?

A. They were in a string.

Q. And they were working all along right next to the wall there, these eight or ten men?

A. Yes, sir, right along there.

Q. How far back from the sidewalk were the last of those men that were working under the wall?

A. They were not less than fifteen or twenty feet, all in a line or string running toward the south.

Q. Fifteen or twenty feet from the sidewalk?

A. Yes sir, to the south.

238 Q. And that was at five o'clock in the afternoon, as near as you can remember?

A. Shortly after five o'clock, because I was working then close to the park, and our rule is to work eight hours per day and stop work at five.

Q. Did you quit then, near the park at five o'clock, and walk right on down to the corner—down to the corner of Second Street where this work was going on?

A. Yes, sir, and must have taken me not over five minutes to get there.

Q. And when you got down there you went to the northeast corner of the Barnett lot, as I understand you, and sat down there?

A. I stood right at the corner of the drug store and looked inside

of the cellar and then I left there and went and sat down at the corner of the lot.

Q. You stopped as you went by—you first stopped and looked into the excavation?

A. Yes, sir, for about two or three minutes and then I went on and I went to the corner and sat down.

Q. And when you stopped there and looked down into the excavation it was about six feet deep there at the corner, as I understand you?

A. That was the least it was.

Q. You mean six feet from the sidewalk where you were standing—six feet below you?

A. More or less, because I judge by the size of the men, to be five—between five and six feet, or six feet, and I know the
230 difference by looking—comparing.

Q. Standing over those men and looking down, it looked to you that it was about six feet?

A. More or less, yes, sir.

Q. Well, when you left there you went over and sat down at the corner of lot one, that is, at the corner of Central Avenue and Second Street?

A. Yes, there I sat down.

Q. And there is where you were sitting, Mr. Sandoval, when you first noticed that the wall was about to fall?

A. Yes, sir.

Q. And you think you had only been sitting there a few minutes when you first noticed that the wall was about to fall?

A. Yes, sir.

Q. And the first thing you say that you saw was this rock that was laying, as I understand you, partly on the sidewalk and up next too the Ruppe foundation—the first thing you noticed was that rock falling?

A. When the rock fell down, the men were working near by there and when these men moved I cast a glance to the wall and I noticed that the wall was giving away.

Q. And then the first thing you saw was the falling of this rock?

A. From where I was sitting, yes, sir.

Q. And the men moving to get away attracted your attention to the wall?

A. And we called to them to get away; that the wall was going to fall.

Q. When you saw this rock fall and saw the men begin
240 to move away, was that when your attention was first called to the wall?

A. Yes, sir, they got away immediately towards the south, and the wall was giving away very slowly.

Q. Where was the first crack that you saw in the wall?

A. I saw it about forty feet back from the front, that is, judging from sight only, and not exactly in the middle, because the house or building was longer by about that distance.

Q. You saw the wall as it fell, didn't you Mr. Sandoval?

A. Yes, sir.

Q. Well, this crack that you saw was where the wall parted when it fell, was it not?

A. The break that I saw was the one that opened from top to bottom.

Q. Yes—and after the wall fell the part south of that break was still standing, was it not?

A. Yes, sir, a portion was left standing.

Q. And that was the portion that was on the south side of this opening which you saw?

A. From where the break occurred, more or less, about the middle, as I have stated, the portion to the north was the portion of the wall that fell.

Q. Yes—and the other portion remained standing?

A. Yes, sir.

Q. Well, how long was it from the time that you first observed this crack in the wall till the wall finally fell, as near as you can say?

241 A. It must have been not less than fifteen or twenty minutes before it fell, as it fell very slowly.

Q. You had time to go into the drug store and talk to Mr. Ruppe and get everybody out before the wall finally fell?

A. When I first noticed that small pieces of adobe were rolling down and dirt was loosening on the wall, and I noticed a great many ladies going into the drug store, then I went inside——

Q. I do not care for all that. I say that after you saw this crack you had time to go into the drug store and tell Mr. Ruppe and the people in there that the wall was about to fall, and you all got out again before the wall fell?

A. I went in right quick and told him.

Q. I am not asking you to go into details; I am asking you if you didn't have time to do that before the wall fell?

A. Yes, sir, I went in and out.

Q. So that you think it must have been fifteen or twenty minutes from the time you first noticed these indications that the wall was falling till it finally fell?

A. When the wall first began giving away——

Q. I am not asking you that. I am asking you if you don't think that was about fifteen or twenty minutes—you can answer that, yes or no?

A. More or less, that must have been the time that it took for the wall to fall down finally.

Q. You say that you knew some of these men that were working there in the excavation?

A. Yes, sir.

242 Q. Well, you knew more than the ones you have named, didn't you?

A. Possibly I did, but I do not remember now the men—the names I have mentioned here I knew because they were my neighbors. If there would be a man, that is, one of the men who had

been working there who could be called by name I would probably know him—know them all.

Q. As a matter of fact, at the three other trials of this case you could not remember the names of any of them, could you?

A. As I was not asked about it, of course I did not mention them—I suppose I did not mention them.

Q. You did not remember the names, did you, of any of the men?

A. I have always remembered them.

Q. You remembered them the other time you were here—you remembered the names of these men?

A. Ever since I have testified in this case, yes, sir—that is, since the house—since the building fell down.

Q. You could have remembered and told these names at any of these former trials if you had been asked?

A. Oh, yes.

Q. Well, then, how did it come that when you were not asked this time that you say that you now remember? As I recollect it, you say, I now remember the names of some of these men, and you gave them?

243 A. Because I recall to memory that those men were working there on that day.

Q. You didn't recall it the other three times you testified in this case?

A. I never stated anything about the men who had been working there at that time on the other cases, but now I recall it to memory and I state it.

Q. Nobody asked you for them this time, did they?

A. No; I was called on to state under my oath what I knew about this matter.

Q. Well, you knew this at the other three trials, and you were called on to state under your oath what you knew about it at that time, weren't you?

A. And at those times I did not remember about those men, and at this time I did, and I have mentioned them.

Q. Then as a matter of fact, you didn't remember at the other trials who the men were, did you?

A. I did remember them, but I did not mention them.

Q. And you cannot explain how you came to volunteer the information at this time.

Mr. Wood: I submit the witness has answered that question five or six times, and it is immaterial.

A. Only under my oath.

The Court: I cannot see how it is material. I suppose, from appearances, that the plaintiffs were surprised at the evidence

244 too—unless it appears that they are to be called as witnesses I do not see how it is material.

Mr. Field: We do not know whether they are to be called or not; we think we have a right to find out about this.

The COURT: You have as good an opportunity to call them as the other side.

Mr. FIELD: Perhaps we do not admit that they were there.

Mr. WOOD: We do not expect the gentleman to admit that or anything else.

Mr. MANN: We may be able to prove that they were not there.

The COURT: Plaintiffs' attorneys seem to cross-examine him about that on the same line that you are—so I suppose they were surprised.

Mr. FIELD: We thought that they were trying to anticipate our cross-examination.

Mr. WOOD: If what they want is the fun of chasing him, I think they have done it long enough, and I object to it as a waste of time.

The COURT: I think it is a waste of time if they should be called. I will allow you to cross examine him further on the point.

245 Mr. MANN: I want to ask a few more questions along this line.

The COURT: Go on.

Q. What are the names of those two men that you now recollect, that were working there in this excavation?

A. Dolores Anaya, Antonio Anaya, Ysidro Baca, and I understand—it seems to me, yes also was there Ambrosio Baca.

Q. Those men live here, do they?

A. Antonio Anaya lives in Chilili; he is a cousin of mine.

Q. Where do those other men live?

A. Dolores Anaya lives here in the town.

Q. And where is Ambrosio Baca?

A. Ambrosio Baca lives here in town also.

Q. And where is the other Anaya—you say the other Anaya is in Chilili?

A. Yes, sir.

Q. Now, when did you first tell anybody that these men were at work there, and that you remembered that they were at work?

A. I have not told anyone that these men were at work there—I have now just told you.

Q. This is the first time that you have ever divulged that?

A. I have always known about these men on these occasions in this case, and so many questions are asked sometimes a man forgets, but if more questions are asked me I might be able to learn more.

Q. In other words, practice makes you perfect?

246 Mr. WOOD: I object to that.

The COURT: Sustained.

Q. You were right here all during the trial of this case last winter, weren't you?

A. Yes, sir.

Q. Don't you know that during that trial there was more or less said about who those people were, and that nobody that appeared here seemed to be able to give any information as to who those people were?

A. I understand that nothing of that kind was asked me.

Q. Well, but you sat here during the trial and heard the other witness testify, did you not?

A. Sometimes I was in and sometimes I was out, and I did not hear the whole testimony given—the same as on this trial, I have been all the time outside the courtroom until this morning when I was called in.

Q. Now, have you ever talked with these men you mentioned, about their having worked there at the time the wall fell?

Mr. WOOD: I object to his going further on this line, merely because it is a waste of time, and the cross-examination has proceeded as far as is reasonable.

The COURT: Sustained.

Q. Have you ever told Mr. Ruppe or his counsel, any of these lawyers engaged in this case, that you knew that these men
247 or any of them were working there at the time that the wall fell?

A. I never told them anything.

Q. You never told anybody about it at all?

A. No.

Mr. WOOD: I object to that.

The COURT: Sustained.

Mr. MANN: Exception.

Q. Now, going back to the time the wall fell, Mr. Sandoval, did you see the wall as it fell?

A. Why, undoubtedly I did, I was right there.

Q. You saw it when it fell?

A. Yes, sir.

Q. And you were positive that none of those adobes fell on the sidewalk?

A. I so understand it that no adobes fell on the sidewalk, except the window.

Q. Was the window an adobe?

A. I never saw any adobe window.

Q. Then if the window was the only thing that fell on the sidewalk, it was no adobe, was it?

Mr. WOOD: I have no objection to Judge Mann amusing himself if it did not take time.

Mr. FIELD: The gentleman is becoming very economical of time.

The COURT: Proceed.

A. The windows are all lumber and glass, and that was the portion that fell on the sidewalk.

248 Q. Do you mean to say that that glass and window actually fell on the sidewalk.

A The glass fell right on the sidewalk—a support of the corner, or a post, remained partially inclined and standing, leaning toward the north.

Q. You do not mean that the whole front fell, actually fell down, do you?

A. No, sir, it remained partially inclined toward the sidewalk.

Q. And afterward that front was propped up and stood there, didn't it, for some little time?

A. Yes, sir, for some days.

Mr. MANN: That is all.

Cross-examination by Mr. FIELD:

Q. You understand English, don't you, Mr. Sandoval

A. I understand some English, yes, sir.

Q. You know all that goes on here in English, before it is given to the jury, don't you?

A. I can understand a great many things, but a great many questions I do not understand, but the greatest portion—the greatest part of it I do undertsand.

Q. You speak English habitually, in the transaction of your business don't you?

A. Yes, sir.

Q. Now, when have you seen Dolores Anaya, Antonio Anaya, Ambrosio Baca and Ysidro Baca?

A. I have seen them always.

Q. When did you last see any one of those four men?

249 A. The last time I saw Dolores Anaya was this morning, over town.

Q. Did you talk with him?

A. No, sir.

Q. When was the last time you saw Antonio Anaya?

A. About two months ago when he came here on a visit to his daughter at Las Martinez, and went back.

Q. Did you talk with him then?

A. Just common conversation about matters here in town, and also asked him what was going on over here in the mountains.

Q. You didn't talk with him about this case, or the falling of this wall?

A. I have not talked to any of them about the falling of the wall since the wall fell.

Q. You never talked to any one of these men that you mention?

A. I have never told them anything.

Q. Where did you last see Ysidro Baca?

A. I think it is about a month ago.

Q. When did you last see Ambrosio Baca?

A. I see him almost all the time, because he lives right there at Martinez where I live.

Q. You say you never mentioned to anybody, until you mentioned on the witness stand here, the fact that you remember that these men were at work here on that day.

A. I have not told anybody.

Q. You have testified at every trial that has been had of this case up till now, have you not?

A. Yes, sir.

250 Q. I understand now, that you say the first thing you saw with reference to this wall was that you saw a foundation stone at the northeast corner partly on the sidewalk and partly under the Ruppe wall and partly on the Barnett wall, fall into the hole: that is what you say now, is it?

A. There was very little of it under the Ruppe foundation or Ruppe lot, the greatest part was in the Ruppe foundation, and partly resting on the sidewalk.

Q. What I want to get at is the very first thing you noticed about that wall, and the thing that caught your attention was the falling of that stone?

A. Yes, sir.

Q. Now, I will ask you if, on the first trial of this case you were not asked these questions and did not give the answer as I will read: "Q. Now, Mr. Sandoval, were you present when the building fell? A. Yes, sir. Q. Now state to the jury what you saw. A. When I sat on the east corner of Barnett's lot—I was there fifteen or twenty minutes previous to the fall of the wall—I was sitting down there—when I looked up towards the top of the wall I noticed that the wall kind of moved on top and a few of the adobes commenced to fall down, broken up." Did you not, on that trial testify in accordance with these questions and answers?

A. The same as I do now, because when I say broken adobes—it was that those was broken up, mashed or crumpled, and falling from the top.

251 Mr. FIELD: I move to strike out the answer as not responsive to the question, that it is the same as it is now is for the jury to say.

The COURT: That will be stricken out and the jury need not consider that. He was asked whether before he testified in a certain way.

Q. Now, answer this question yes or no, did you so testify on the first trial of this case?

A. What I testified in the first trial was the truth, as I swore to do so, and the same thing I do now.

Mr. FIELD: I ask that that answer be taken from the jury, and that the witness be instructed to answer the question.

The COURT: Yes, he has not answered the question. (To witness) You are asked whether you did so testify before: not whether it is true or what you testified this time, but just if you did so testify at that time.

A. Yes, sir.

Q. Now, on the trial of this case which took place in November, 1906, you were a witness, were you not?

A. Yes sir.

Q. I will ask you if, on that trial, you were not asked the following questions and did not answer as I shall read to you: "Q. Now, what I want to ask you about, Mr. Sandoval, is—you said you saw the dirt or adobe moving at the top of the wall; that is the first

thing that you saw. Now, what part of the wall was that?
252 A. Yes, sir, I saw those little pieces of adobe slipping down or falling down about fifteen or twenty feet from the north corner—to the south." Now, were you not asked that question on the trial which took place in 1906, and did you not make the answer which I have read to you? You can answer this question yes or no.

A. Yes, sir.

Q. Now, you sat on the northeast corner of the Barnett lot and saw a crack at the top of the wall about forty feet back from the sidewalk, did you not?

A. Now that my attention has been called by the reading of the testimony, I was mistaken when I said it must have been about thirty or forty feet back; it must have been a distance as it was mentioned there.

Q. It must have been a distance—you were mistaken when you said it was forty feet.

A. I did not state positively forty feet, but just said more or less.

Q. Now, I want to know now what your present recollection is on this proposition, entirely without regard to what you may have testified to in the past: did you not, while sitting at the northeast corner of the Barnett lot, see a crack open in the top of the wall about forty feet back from the front—a crack when you first saw it which was sufficient to put your hand in, and which opened down toward the foundation and grew larger and wider at the top as it opened down.

A. Yes, sir, it was opening more to the top as the wall was sliding down.

253 Q. Did you not then go into Mr. Ruppe's drug store and tell the people that the house was going to fall, and that you showed Mr. Ruppe this crack at the top of the wall, coming down toward the foundation?

A. Yes, sir.

Q. Then didn't you go out on the sidewalk and stand and see the wall until it fell?

A. Yes, sir.

Q. And was it not after you got on the sidewalk that you first saw and called attention to the fact that the window was pushed toward the north?

A. Yes, sir.

Mr. FIELD: That is all.

Mr. WOOD: No questions.

JOSEPH L. LA DRIERE, introduced as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. WOOD:

Q. State your name?

A. Joseph La Driere.

Q. Your occupation.

A. Architecture.

Q. How long have you resided in Albuquerque?

A. Since January, 1900.

Q. And have you practiced your profession as an architect during all of that time?

A. Yes, sir.

254 Q. Do you know the plaintiffs and defendants in this case?

A. Yes, sir.

Q. Were you in the employ of the defendant, Joseph Barnett, as an architect for the erection of a building on lot number one in block 16 of the original townsite to the city of Albuquerque, in June, 1902?

A. Yes, sir.

Q. And where was that building to be erected?

A. On lot one block 16, original townsite of the city of Albuquerque—do you wish the streets

Q. That is what I had in mind, whereabouts on what street?

A. The southeast corner of Second and Central avenue.

Q. Southwest corner, you mean.

A. Southwest corner, I should say.

Q. This lot was immediately adjoining the Ruppe drug store at that time, was it not?

A. Yes, sir.

Q. Do you remember the occasion when the wall of the Ruppe building fell on that lot?

A. Yes, sir.

Q. Prior to that time had you been employed by Mr. Barnett to plan a building for him at that point?

A. I do not understand the question.

Q. Prior to the time of the fall of the wall, had you been employed by Mr. Barnett to plan a building to be erected on this corner?

A. On lot one?

Q. On that corner?

255 A. Yes, sir.

Q. And when were you so employed?

A. Sometime in May of that year.

Q. That was your first employment by Mr. Barnett to plan a building for him upon that corner?

A. Yes, sir.

Q. Did you make or cause to be made, plans for a building for Mr. Barnett prior to the falling of the wall in question, on that corner?

A. I prepared the plans—part in May and the rest in June: I do not think they were quite complete at the time.

Q. Have you those plans at present?

A. No, sir.

Q. Where are they, if you know?

A. Why, a copy of the foundation plan is here in the court room and the rest of them has been discarded; and I may add to that, if you wish, that I have used that paper for other purposes.

Q. When did you discard them? When did you use that paper for other purposes?

Mr. FIELD: I do not see the materiality of this and I object to it as immaterial.

The COURT: How do you think it is material?

Mr. WOOD: We wish to show those plans. We wish to see what kind of a building and the extent of the building the defendant Barnett was planning at that time, before the fall of this wall.

256 The COURT: He said the foundation plan was here, did he not?

Mr. FIELD: Yes, sir.

The COURT: Which would show, as far as the land went.

Mr. WOOD: We think it would not show—we think the original ones would show something more than is shown by the foundation plan. We wish to find out what has become of them and why they were destroyed or discarded.

Mr. FIELD: I do not see, if they were here, what use could be made of them. It does not make any difference what they might show; I suppose Mr. Barnett had a perfect right to build castles in the air if he wanted to. He was not bound to submit his plans to Mr. Ruppe either before or after this accident. To draw plans may sometimes be very pleasant amusement.

Mr. WOOD: Suppose it should appear that the plans, instead of being castles in the air, contemplated leaving our castle in the air. Would it not then bear upon the issue of a direct, intentional trespass?

(After argument.)

The COURT: I will overrule the objection. It seems to me that the pleadings are open to the construction of a probable trespass.

Mr. FIELD: We except: and I wish to make the objection

257 more specific, that anything shown by the witness La Driere in the way of drawing plans for a building, which were never executed, is wholly immaterial and tends merely to confuse the minds of the jury and to introduce a false issue in the case, and one not within the pleadings.

Mr. MANN: The defendant Weinman joins in the objection, and objects further, upon the ground that any plans or specifications drawn by the architect for Mr. Barnett, would not be binding upon him, nor could they be used as evidence against him, under the pleadings in this case.

The COURT: That same kind of an objection, I suppose, was made to the party wall agreement.

Mr. MANN: Your Honor, I do not know as to that: I think he signed the party wall agreement—the plaintiffs claimed he did.

The COURT: I will overrule the objection.

Mr. MANN: Exception.

Mr. FIELD: Exception.

A. I remember very distinctly making a plan for a residence for Mr. Jesus Romero and using just such a paper as that, of the second and third floors that would have been over this foundation, and printing Mr. Romero's house on the back of them, and I have a special occasion to remember that, if you wish it stated.

258 The COURT: He asked you when.

A. That was in 1903.

Q. Was it before or after the first trial of this case?

Mr. FIELD: I object to that as wholly immaterial and as tending to introduce a false issue here and to prejudice the jury.
The COURT: Overruled.
Mr. FIELD: Exception.

A. It was in February or March, 1903.
Q. Did you keep in your office, at any time, copies of those plans since February or March, 1903?

Mr. MANN: Objected to for the same reason.
The COURT: Overruled.
Mr. MANN: Exception.

A. That is the last that I remember of having them, with one exception, that I also built a second house for Mr. Romero from the same plans two years ago, and the plans still produced the office building on the back of them—having the residence plan on the blank side and the other side still showed the office building of the original plan.

Q. Where are those plans with the Romero plans on one
259 side and the Barnett building on the other side, if you know, now?

A. I think that Mr. Hesselden has a set, possibly, in his office yet.

Mr. MANN: To all of this we make the same objection.
The COURT: Yes.

Q. Now, those plans that you have mentioned, were they for a building to cover one lot or more than one lot?

Mr. FIELD: I object to it because the plans are the best evidence and it is wholly immaterial whether for one lot or two.
Mr. WOOD: I will withdraw the question for the present.

Q. Were you ever requested by Mr. Barnett to prepare plans for a building to cover both lots one and two in block sixteen?

Mr. FIELD: Objected to as incompetent, irrelevant and immaterial, and as tending to introduce a false issue before the jury.
The COURT: You said ever——
Mr. WOOD: Yes.
COURT: Objection overruled.
Mr. FIELD: Exception.

A. Yes, sir, I was.
260 Q. When, with reference to the fall of the wall of the Ruppe building, were you first requested by Mr. Barnett to prepare plans for a building to cover both lots one and two?

Mr. MANN: Same objections.
Mr. FIELD: Same objections.
The COURT: Overruled.
Mr. FIELD: We except.

A. I should think about a month after the wall fell.
Q. You say that is the first time that you were requested by Mr.

Barnett to prepare any plans for a building to cover both lots, do you?

A. Yes, sir.

Q. Did you prepare or assist in the preparation, or direct the preparation, of plans for a building to cover those two lots at any time before the fall of the walls of the Ruppe building?

Mr. FIELD: We object to that as wholly irrelevant, and tending to introduce a false issue before the jury.

The COURT: Overruled.

Mr. FIELD: Exception.

A. No, sir.

Q. Did you have an assistant in your office at and prior to the time of the fall of the walls of the Ruppe building?

261 Mr. FIELD: Objected to as wholly immaterial.

The COURT: I do not see how it is material.

Mr. WOOD: I want to find out the name of the young man whom I understand was an assistant in his office at that time.

Mr. MANN: It is cross-examination.

Mr. WOOD: It is information I am after.

The COURT: Objection overruled.

Mr. FIELD: We except.

A. I had two apprentices.

Q. And what were their names?

Mr. FIELD: Objected to for the same reasons.

The COURT: Objection overruled.

Mr. FIELD: Exception.

A. Mr. Hughes—John D. Hughes—and Sam Miller.

Q. Do they live here now?

Mr. MANN: Objected to as incompetent, irrelevant and immaterial, and cross-examination of his own witness.

The COURT: Overruled.

262 Mr. MANN: We except.

A. Mr. Hughes lives here: I do not know where the other one is.

Q. Have you in your possession the original plans prepared by you for the present Barnett building?

Mr. FIELD: We object to that as wholly immaterial what transpired subsequent to the fall of the wall; it cannot certainly be competent evidence in this case.

The COURT: Overruled.

Mr. FIELD: Exception.

A. No, sir, I have not got any of them at all.

Q. Do you know where they are?

A. No, sir; they were really all practically destroyed when I got through with the construction of the building.

Q. Is it your custom to keep plans, or do you destroy them when you have finished?

Mr. FIELD: Objected to as cross-examination of his own witness.
The COURT: Objection sustained.

Q. Will you tell us what the drawing or document is that I now show you?
A. Yes, sir.
Q. What is it?
A. That is a copy—this paper in my hand at present is a
263 copy of the foundation drawing for that proposed building on lot one.
Q. And when was that made?
A. It was made either in May or June, 1902.
Q. And who was in charge of the erection of the building for which the excavations were then being made on lot one?

Mr. FIELD: Objected to as leading and suggestive, and it assumes that somebody was in charge of the erection of the building on lot one.
Q. I will say the erection of the building for which the excavations were being made on lot number one at the time of the fall of the Ruppe wall.

Mr. FIELD: I object to it for the reason that the further intention of the parties is wholly immaterial—it is wholly immaterial who was in charge, and what was going on there is irrelevant and incompetent here.
The COURT: Objection overruled.
Mr. FIELD: Exception.

A. I was.
Q. And tell us whether or not the excavations then being made were in accordance with and following the plan which has just been shown you.

Mr. FIELD: To which we object as calling for a conclusion of the witness.
The COURT: Objection overruled.
264 Mr. FIELD: Exception.

A. They were made pursuant to these instructions—plans—to that effect——

Mr. WOOD: We offer in evidence this foundation plan.
Mr. FIELD: I object to it because it is not shown that any foundation was ever constructed in accordance with the plan.
The COURT: Objection overruled.
Mr. FIELD: We except.
Thereupon the plans were marked plaintiffs' exhibit H.
(Inasmuch as it is impracticable to incorporate the said foundation plan heretofore marked Plaintiffs' Exhibit H in this bill of exceptions, the same is ordered to be transmitted by the clerk of this court to the clerk of the Supreme Court of New Mexico as a part of the record in this cause.)

Q. Were there specifications drawn of the work upon the basement to execute this plan, Mr. La Driere?

Mr. FIELD: I object to that for the reason it is immaterial.
The COURT: Objection overruled.
Mr. FIELD: Exception.

A. Yes, sir.

265 Q. You were a witness upon the second trial of this cause, were you not?

A. Yes, sir.

Q. Do you remember whether or not an original of the specifications was produced and offered in evidence—here upon that former trial?

Mr. MANN: Objected to as incompetent, irrelevant and immaterial whether they were or not.
Mr. WOOD: I wish to identify them as things which have been lost.
The COURT: Objection overruled.
Mr. MANN: Exception.

A. I remember there was a specification introduced—I could not say whether they were the ones I prepared, or a copy of them—I do not remember that.

Q. Will you examine the printed copy purporting to be a copy of specifications, which I show you and tell us whether or not those are a copy of the original—a correct copy of the original specification?

Mr. FIELD: We object, if the Court please, for the reason that there is no proof of the identity of the original specifications at the time they were introduced in evidence on the second trial of the case. The record of that case shows on page 64, that plaintiffs thereupon offered in evidence the specifications for the building, which was marked Exhibit 3, and admitted without objection, and the

266 Court's ruling at that time obviated the necessity of any proof of the specifications but does not now.

Mr. MANN: We object on the further ground that no proper foundation has been laid for the introduction of the copy or for an original.
Mr. WOOD: It seems to me the question does not go to that at all.
The COURT: He has not yet offered it, but he asks him if he knows whether it is a correct copy.
Mr. MANN: It is immaterial whether he knows it or not.
The COURT: Objections are overruled.
Mr. FIELD: Exception.
Mr. MANN: Exception.

A. It apparently is a copy of those—yes, sir.

Mr. WOOD: We offer that now in evidence.
Mr. FIELD: We object to it for the reason that no proper foundation has been laid for the introduction of secondary evidence, and no foundation laid for the introduction of the original specifications, if they were here themselves—we distinctly make both these objections.

Mr. Wood: We call the Court's attention to the fact that
267 this is one of the documents proved to have been in the clerk's office at the second trial and to have since disappeared.

The Court: From my own recollection I cannot say whether this is one or not—whether the testimony of the clerk or of anybody else made this one of the missing papers.

Mr. Wood: It is my recollection that counsel stated and agreed that the papers, copies of which were used here at the former trial, are the exhibits which were missing from the clerk's office; that is correct, is it not? At the beginning of this trial?

Mr. Field: If I understand what Mr. Wood is saying now, I think that I stated that those papers which are embraced in that package, identified and marked copies of exhibits, December 24th, 1909, filed—that the originals of those were present at the former trial—at the second trial, and were not at the last trial; I think that is the statement I agreed to.

The Court: Then the clerk testified that he could not find them.

Mr. Wood: Mr. Field also testified that in his judgment these were the papers which were in his office, and that he could not find them. Before your Honor rules I wish to say that the paper I have shown the witness is the paper heretofore referred to in this
268 case, marked copies of exhibits filed in my office this December 24th, 1909, John Venable, Clerk.

The Court: Mr. Field's opinion is that as it was admitted without objection at the former trial; that does not necessarily entitle it to be admitted by copy now.

Mr. McMillen: Mr. Field's statement is incorrect; it was identified and proved by Mr. La Driere, as will be seen on page 61.

Mr. Field: I say I do not care—there was no objection at that time and I do not care whether it was admitted or proved or not—proof at that trial does not do any good now. I say it was admitted without objection at that trial, but we are not precluded now from making objection because we did not make one then.

(After argument.)

The Court: I will overrule the objection.

Mr. Mann: We except.

Mr. Field: We except.

Thereupon the specifications referred to were marked plaintiffs' exhibit I, and is in words and figures following, to-wit:

PLAINTIFFS' EXHIBIT I.

"Specifications of the excavation and rubble stone work re-
269 quired in the foundations of a (3) story building to be erected on the southwest corner of Railroad Ave., this city, for Joseph Barnett, Esq.

Excavate the entire basement as per the plans, to the depth sufficient to be (8-0 in.) below the sidewalk grade taken at the corner intersection of the (2) streets, all to be cut sufficiently large to

enable the stone work to be properly done, for the footings, and piers, and the excavation the west side will have to be done to within (5-0 in.) of the adjoining building, when this will be removed in sections, not over (5-0 in.) at the time when stone work will have to be built in sections, also supporting the wall of the adjoining building, as the excavation is being done. All the dirt to be disposed of by and at the expense of the contractor. Proper care will have to be exercised in protecting the public while the work is being done, put up all required guards, and rail, or night light ,and also to protect the cement sidewalk, all done in the manner directly by the architect.

Rubble Stone Work.

Build the entire foundation, walls, pierse and areas with good and sound mountain granite, all to be laid on their widest natural bed laid close together, in good lime and sand mortar, laid with no empty spaces in the wall, using the largest stone for the footings, the first courses to be well bedded in sand, with no vacancies under same, all piers to be built battering as showed on the plans, all stones to be well fitted together, and well bounded and the
270 small walls show- between the piers are to be well bounded in the piers, build the (2) areas for shutes, as seen and same are to be (3-6 in.) deep the one in the alley to be covered with a cut stone cap the full size of same and to be provided with (20 in.) cast iron cover properly set in the stone cap as per plans, leave all the required holes and recesses in the walls for pipes, build the west wall as a party wall and the building on the adjacent lot is to be well protected while the work is being done, in the manner specified on the excavating specification, by excavating in sections, not over (5-0 in.) long at any one time, and using timber props, should it be required, to properly support the old wall without causing any settlement, all the footing courses of this wall to be well bedded in sand all the stones to be well laid in the manner specified for the piers, with the — before said mortar, all stones to be well laid close and tight together, and be well *laid close and tight together and be well* wedged to the under part of the old wall, all to be done as directed by the architect. Build the south half of the foundation from the line marked A-B on the plans, to the alley including the rear wall, level with the sidewalk, while the north half of the foundation from the said line to the north end is to be (10 in.) below the sidewalk. All to be perfectly straight and leveled to a line, all piers to be on the line, and perfectly leveled also. Point up the entire inside or all the exposed stone work, with good lime and cement mortar, mixed with clean sharp sand, and the entire surface of the said stone work, and pointing, to be well
271 cleaned down with a stiff metallic broom, at its completion, and is to have good and neat appearance when completed.

Provide all the required guards, rails and night light, to well protect the public, all to be done as directed, and to the entire satisfaction of the architect.

The owner reserves the right to reject any or all bids, and he will also have the lot surveyed, for the contractor to lay out their work by."

The hour of twelve o'clock noon having arrived, a recess was taken until two p. m. this day.

Q. Mr. La Driere, will you examine this document and see if you recognize it? (Exhibiting a paper to witness.)
A. Yes, sir, I recognize it.
Q. Who drew that document, if you know, Mr. La Driere?
A. I did.
Q. Do you know the signatures to it?
A. Yes, sir.
Q. And whose are they?
A. Joe Barnett and Jacob A. Weinman.
Q. The defendants in this case?
A. Yes, sir.
Q. Do you know when that instrument was executed?
A. On the sixth day of May, 1902.

Mr. WOOD: We offer this in evidence, being the party wall agreement.

Mr. MANN: Defendants object to the introduction of the
272 party-wall agreement, because it is incompetent, irrelevant and immaterial, and does not tend to establish any of the issues in this case, and does tend to place before the jury a false issue.

The COURT: Objection overruled.
Mr. MANN: We except.

Thereupon the document was marked Plaintiffs' Exhibit J, and which said exhibit is in words and figures following, to-wit:

(EXHIBIT J.)

This agreement made this sixth day of May, A. D. 1902, by and between Joseph Barnett of the city of Albuquerque, County of Bernalillo, and the Territory of New Mexico, party of the first part, and Jacob A. Weinman, also of the above said city, county and territory, party of the second part.

Witnesseth, that whereas, the said party of the first part is about to build a building upon lot (1), Block (16) in the original townsite platt of Albuquerque, New Mexico. And it is mutually desired by the party of the first part, that the west wall of said building which shall be between said lots (1) and (2) in the same block, to-wit, (16) and shall be a party wall therefor, the said parties hereto have, and do, mutually agree, each with the other,

1. That the said wall of said building shall be located one-half of its full thickness, including footing, foundation, first
273 and second story wall, upon said lot (2) and one half of said wall as above described upon lot (1) of the above said block (16)—

2. The footing course shall be (40″) wide, built of sound mountain granite, rubble stone masonry—

3. The foundation wall shall be also of mountain granite from the top of the footing to its full height, where it will receive the first floor joist and will be (18″) thick.

4. The first and second story wall to be (13″) thick, the brick wall above the second story ceiling joist including the fire wall is to be (9″) thick, all to be built of good hard burnt local brick, all to be laid in good lime mortar.

5. The party of the first part is to be permitted to take down any part of the wall now between the said lot (1) and (2) which will be necessitated in order to locate the new wall centrally over the line.

6. If in the erection of said wall damage should be done to the building now on lot (2) through the fault of the party of the first part, the said party of the first part is to pay and to make good to the party of the second part in full for all such damage.

7. Said party of the first part is to pay the entire cost of building the said party wall, but if at any time or times, the said party of the second part, or his successor, his heirs or assigns, in ownership of said lot (2) in said block (16) should make use of any part or parts thereof — said party wall, by erecting a new
274 building or additions to the old buildings, now on lot (2) then he, or she, or they, shall be bound and compelled to pay said party of the first part or his successors, heirs, or assigns, one half of the cost of the said party wall, or as much of it as may be used.

In case of no cellar being built on said lot (2) then the cost of the party wall to the second party shall be estimated on the basis that the footing of said party wall be (30″) between the top of the cement sidewalk in front of said lots (1) and (2) of the above said block. The following rules of measurement shall govern (16½) cubic feet of rubble stone work shall constitute one perch (22½) brick to the cubic foot, wall measurement for a (13″) wall, (15) brick to the square foot of wall measurement for a (9″) wall. The cost of same to be estimated at the prevailing local price of such stone and brick work, at the time it is being made use of.

In testimony whereof witness the hands, and seals, of the parties hereto this day and date in this instrument first above written.

JOE BARNETT.
JACOB A. WEINMAN.

Executed in the presence of C. W. Medler, a Notary Public, in and for Bernalillo County, N. M.

[NOTARIAL SEAL.]

(Endorsement:) Party Wall Agreement. Joseph Barnett with J. A. Wienman.

Q. Mr. La Driere, who had charge of the contract for the excavation work that was being done upon lot number one at the
275 time the wall of the Ruppe building fell?

A. I do not quite understand you. Do you mean charge of the contractor, or the contractor himself?

Q. Who was the contractor who had charge of the work?

A. Mr. Caesar Grande.

Q. And was there a written contract with him?

A. Yes, sir.

Q. And by whom was that drawn, if you know?

A. By me.

Q. Do you recollect whether or not that original contract was produced upon the second trial of this cause?

A. If I remember right, it was.

Q. Will you look at the printed copy of that which I show you from the document which bears the mark, copy of the exhibits filed December 24th, 1909, etc., and tell me whether or not the printed copy upon the two pages which lie open, 71 and 72 are a correct copy of that original?

Mr. FIELD: I object to that, because the witness has not shown himself qualified to tell. He has not said that he knows the contents of the original, or remembers anything about it.

The COURT: Objection overruled.

Mr. FIELD: Exception.

A. That seems to be a copy of it, as well as I can remember it.

276 Mr. WOOD: We offer it in evidence.

Mr. MANN: Defendant Weinman objects to the introduction of this contract in evidence, because it purports to have been made by Joseph Barnett and C. A. Grande, and purports to be a copy of a contract to which he was a stranger and had nothing whatever to do with, and therefore, he cannot be held for anything that came out of it. We also object to it on the ground that no proper foundation for the introduction of the copy has been laid, and for the further reason that there is no sufficient legal evidence that this is a copy unless it is shown that the original at the former trial was properly identified and its execution proven.

The COURT: Objection overruled.

Mr. FIELD: Exception.

Mr. MANN: Exception.

Thereupon said contract was marked plaintiffs' Exhibit K, and which exhibit is in words and figures following, to-wit:

(Exhibit K.)

"Contract.

"This agreement, made this fifth day of June, 1902, by and between C. A. Grande, a general contractor of the City of Albuquerque, party of the first part, of Bernalillo County in the Territory of New Mexico, and Joseph Barnett, a merchant of the City of Albu-
277 querque, party of the second part, of Bernalillo County, in the Territory of New Mexico:

Witnesseth: That said party of the first part for the consideration hereinafter mentioned, covenants and agrees with the said party of the second part, to do all the excavation and the stone work required in the erection and completion of a basement to be erected on the southwest corner of Railroad Avenue and Second Street, in the above said City, County and Territory, all to be done in accordance to the plans and specifications, and as directed by J. L. LaDriere, the superintendent. And it must be completed on or before the 20th day of July, 1902, and the premises must be left clear and free from any surplus material in or about the place, at the completion of the building.

In consideration of which said party of the second part covenants and agrees to pay unto the said party of the first part for the same, the sum of $1,250 No. 100, One Thousand and two hundred and fifty No. 100 Dollars, as follows: To be divided (3) payments, as directed by the architect.

The party of the first part will give sufficient evidence that the party of the second part, or his property, is free from any liens, or any other charges chargeable to him before receiving the last payment.

In Witness Whereof, the parties to these presents have hereunto set their hands the day and year first above written.

C. A. GRANDE.
JOSEPH BARNETT.

278 Executed in the presence of J. L. LaDriere."

Mr. Wood: I will now read these exhi-its to the & jury.

(Counsel thereupon read the exhibits heretofore introduced to the jury.)

Q. I show you the foundation plan marked exhibit H, which you have identified: Will you indicate upon that plan which represents the line or the wall referred to as the party wall, between the Barnett and Ruppe lots or Weinman lot?

A. (Witness referring to plans:) The green drawing on this line here is to be the party wall.

Mr. Field: I do not wish to interrupt, but is there not more than one green line?

Mr. Wood: I will clear that up in a minute, Mr. Field.

Q. Now, there are two long green lines, near the broken line,

with bars on them, running lengthwise with this paper and others running across the center of the paper with A near one of those lines and B near the other: is it the line near the letter B that you have just referred to?

A. Yes, sir.

Q. Aside from this heavy shaded green line at the northwest corner of the foundation plan, as you have identified it, there are some small lines in red, I think outside. Will you tell me what they represent? They are drawn in the square around the corner.

279 A. The dotted lines drawn in a square around the corner indicate the footing of that pier. The red lines that you refer to on the outside of it are witness lines for the dimensions.

Q. The dotted line, then represents the extreme western line of construction of the foundation, as shown by that plan, does it?

A. Yes, sir.

Q. Now, how far is it, according to that plan, from the extreme eastern line of construction to the western line of construction, as the cellar was designed to be, along Central avenue?

A. Thirty feet.

Q. How far is it on that map from the extreme eastern line of the foundation wall, as designed thereon, to the extreme western line of the foundation wall, excluding the piers?

A. Twenty-five feet, nine inches.

Q. Mr. LaDriere, can you tell us what is the weight of adobe per cubic foot?

A. It runs close to one hundred pounds, sometimes a little over and sometimes a little less.

Q. The composition of adobe is what?

A. It is sediment and, very frequently, very fine sand.

Q. Do you know what the weight of clay is per cubic foot?

A. Practically the same.

Q. Well, is not clay represented at one hundred and twelve pounds per cubic foot?

Mr. MANN: We object to this as leading and cross-examination of his own witness.

The COURT: Sustained.

280 Q. You testified on the former trial concerning the weight of clay, did you not, Mr. La Driere?

A. Yes, sir.

Q. Will you refresh your recollection as to that weight? You can refer to your former testimony.

Mr. FIELD: To which we object. The witness has not indicated any need for refreshing his recollection. He is testifying now as to his knowledge of weights.

The COURT: Sustained.

Q. Are you now certain of the weights that you have given?

Mr. FIELD: Objected to for the same reason and as cross-examination of his own witness.

The COURT: Overruled.

Mr. FIELD: We except.

A. The same rule applies to clay as to adobe; adobe is a clay itself. I would, and I did testify of one hundred and twelve pounds here four years ago, and I should so do again. It will average about that, close to one hundred pounds.

Q. You say you testified to that four years ago and would again—one hundred and twelve pounds, is that what I understand you to say?

Mr. MANN: Objected to as leading and irrelevant.

The COURT: I think he already said so.

281 Mr. WOOD: All right; that is all.

Mr. MANN: No cross-examination.

Cross-examination by Mr. FIELD:

Q. I wish to ask Mr. La Driere if the weight of clay per cubic foot depends upon a variety of factors; it does, does it not?

A. Yes, sir, that is what I was referring to; you see it runs near one hundred pounds, sometimes over.

Q. Well, how much one hundred pounds of adobe would weigh would depend at least to some extent, on how much straw is in the adobe, would it not, per cubic foot?

A. Well, I am assuming that the adobe would be clear adobe—not to be mixed with straw.

Q. Not mixed with straw? Don't they mix adobe with straw?

A. You cannot prove it by me, I don't know; I never made any adobe.

Q. Well, as to how much a cubic foot of adobe would weigh would depend upon how closely it was compressed also, would it not?

A. These weights are assumed on a cubic foot of earth.

Q. And you don't know what a cubic foot of adobe will weigh?

A. No more than what I—what the book gives me on ground.

Q. Unless the weight of adobe and clay earth in its natural state is the same, then, you do not know anything about it?

282 A. No.

Mr. FIELD: That is all.

Mr. WOOD: No questions.

BERNARD RUPPE, introduced as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. WOOD:

Q. You are one of the plaintiffs in this action?

A. Yes, sir.

Q. Where do you reside?

A. In the town of Albuquerque.

Q. How long have you lived here?

A. Thirty years.

Q. What is your business?

A. Pharmacist.

Q. And how long have you been engaged in that business?
A. Thirty-five years.
Q. How long have you been engaged in the pharmacy business in Albuquerque?
A. Thirty years.
Q. Where did you live prior to the time you occupied the building that fell? Where was your business conducted?
A. I lived in the Barnett corner, Second street and Central avenue.
Q. You say you lived there?
A. Yes, sir.
Q. Where did you conduct your business?
A. In the same building.
283 Q. And how long had you conducted your business at that place?
A. I believe about four years.
Q. I show you a document: will you examine it please, and tell us what it is? (Exhibiting document to witness.)
A. It is a lease.

Mr. FIELD: The paper will tell what it is itself. I object to the question as asking for the contents of a paper.
The COURT: I suppose it is only to identify it.

Q. Tell us, if you know, by whom that lease was signed.
A. It is signed by Jacob Weinman, Father Di Palma and myself.

The COURT: I think this is one of the lost papers, is it not?
Mr. WOOD: This is apparently a duplicate original found in Mr. Childers' papers.
Q. How many of these were executed at the same time? Was there more than one?
A. Two.
Q. And is this one of the originals?
A. Yes, sir.

Mr. WOOD: We offered the printed copy of this lease before, believing the originals to have been lost. We now ask to withdraw the copy and to offer this original.
Mr. FIELD: We ask to have all the objections made to the
284 paper now offered that were made to the copy as offered, except the one based on the fact that it was a copy.
The COURT: The reading is the same, I suppose.
Mr. WOOD: Perhaps it is a little hazardous to put it in.
The COURT: This is admitted——
Mr. WOOD: Is our motion withdrawing the copy allowed?
The COURT: Yes.

Thereupon plaintiffs' exhibit B was withdrawn and the instrument now offered marked plaintiffs' exhibit BB substituted in its stead.

Q. This lease appears to be dated November 9th, 1901. After the execution of that lease did you go into the possession of the building?

Mr. FIELD: I object to that as leading and suggestive. I ask that the witness state what was done and who did it.

The COURT: Objection sustained.

Q. What was done and who did it, in the way of taking possession of the Weinman building under that lease?

A. I took possession of it and moved the drug store into it.

Q. And when did you do that?

A. On the 15th day of December, 1901.

Q. And for what purpose did you make use of the building thereafter?

285 A. For the purpose of running a retail drug store.

Q. How long did you occupy that *that* building after you moved in?

A. Until the 30th day of June, 1902.

Q. And what happened then?

A. The east wall of the building collapsed and made the premises untenable (*untenantable*) and I had to move out, stock and all.

Q. Do you remember when excavations commenced upon the lot next to you? To the east of you, prior to the fall of the wall, about how long before?

A. It commenced in the month of June.

Q. Did you see who was there overseeing or superintending the work of making these excavations?

A. Mr. La Driere.

Q. And do you know who, if any one, under him was in charge superintending the men in the work?

A. Cæsar Grande.

Q. Did you notice, Mr. Ruppe, the condition of the excavation near the east wall of that building on the day the wall fell and before it fell?

A. Yes, sir.

Q. Describe the condition of the excavation along your east wall, as you last noticed it before the fall of the building?

A. There was an excavation dug immediately under the corner of my wall, possibly five feet wide, having the depth of the cellar and slanting in under my wall: then there was a bank of earth,

286 and beyond that there was another excavation similar to the first one, and then another bank of dirt and then was another excavation, but that was not as deep as the cellar—the cellar was inclined up from the north to the south on account of teams turning and hauling out the dirt.

Q. Did you notice to what extent the excavation at the corner extended under your wall?

A. It looked to me as though it was ten inches on top and two feet wide at the bottom, slanting in from the top to the bottom, under my wall.

Q. And did you notice about the second excavation that you have testified to?

A. The second excavation, as I remember it now, appeared to me to be straight up and down with my wall and I did not see quite into it from where I was standing.

Q. When was your attention first called to the threatened fall of the wall?

Mr. FIELD: I object to that as leading and suggestive.
The COURT: Overruled.
Mr. FIELD: Exception.

A. Various times during the day, but I do not remember when first my attention was called to it, or by whom.

Mr. FIELD: I move to strike out the answer of the witness.
The COURT: I do not think he had finished.

A. (Cont.). I do not remember who was the first one that
287 called my attention to it, as to the wall threatening to fall.

Mr. FIELD: Now, I move to strike out the answer of the witness as incompetent and giving to the jury hearsay and matter which is not binding upon the defendants Weinman or Barnett.
The COURT: I will sustain the motion to strike out, except as to what he saw himself.

Q. What did you notice in regard to the falling of the wall, and when did you first notice it?

Mr. FIELD: Of course if your Honor please, I do not want the court to misunderstand our position, I think we stated it before. What was said at the time of the fall of the wall is part of the res gestæ and we do not object to it, but what may have been said prior to that time we do object to.
The COURT: I struck out the previous answer, and now he has told what he observed himself.
Mr. FIELD: No time is fixed for that.

A. Between 5:30 and 6 o'clock my attention was directed to a crack in the wall and I immediately ran out and asked the people to leave the premises, and endeavored to get props to prop up the wall—seven minutes afterward the wall came down.
Q. Where was that crack?
A. To the best of my knowledge about fifty feet south of the east corner of my lot.
288 Q. How was your attention called to the existence of that crack first?
A. I was working at the show case, making out the bills when Aban Sandoval ran into the store telling me to get out as quick as I could and pointing to the wall and showed me where it was cracking and the wall sinking towards the north.
Q. How wide was that crack when you first saw it?
A. About two inches, to the best of my recollection.
Q. And how did it extend, in what direction and to what extent—in what dimensions?
A. It ran from the top to the bottom. The store was papered with blue paper and the crack was, when I saw it—extended about half of the wall—at the top, as I say, I believe it was two inches and towards the bottom was smaller.

Q. Did you notice the two sides of the crack as to whether they were flush with each other, or had separated sideways?
A. I did not wait for that.
Q. Did you see the wall as it fell?
A. Yes, sir.
Q. And describe the appearance of that wall as it fell, how it fell?
A. When I ran out of the store the windows already were crunching and the glass was commencing to crack and it seemed that the pressure was towards the north. I tried to get the props—tried to get back into the store, but Marshall McMillan ordered myself and everybody to keep away from there. I tried to find Mr.
289 Grande and Mr. La Driere: sent for Mr. Weinman, and I then stood in the middle of the street and watched the wall coming down. The window glass, by that time, was broken into small pieces; the adobe immediately east of the wall fell across the sidewalk, and the balance of the wall appeared to me to slide into the excavation; then the dust was so fierce that I could not notice anything more until it had subsided.
Q. You said the adobes on the east of the wall—is that what you mean? The wall faced—sided to the east, did it not?

Mr. FIELD: I object to that question as cross-examination of his own witness.
The COURT: Objection overruled.
Mr. FIELD: Exception.

A. The window that I refer to faced the north, and on the east side of that is a wall to which that window is attached and is also the east wall of my store. Those adobes that I refer to as falling across the sidewalk were the north end of the east wall of my building.
Q. Now, Mr. Ruppe, you examined the situation after the fall of the wall and the dust cleared away, did you not?
A. Yes, sir.
Q. And tell how the debris of this wall lay and where it lay after it had fallen?
A. A piece—the north piece, about two or three feet which
290 was against the show window partly fell across the street; the balance of the wall, up to where the crack was, lay in the excavation on the Barnett lot. A few of the fire wall adobes had fallen into the street and on the west side of the street some adobes had been wrenched out by the movement of the roof to the north, and fell on the soda fountain, show cases and floor. On top of the roof—the whole east side having caved down, there were a few adobes laying also.
Q. How much of the adobes, Mr. Ruppe, were inside, that is, to the west of the original position of the east wall of your store?
A. I cannot state definitely how many, but there were some.
Q. Your best judgment as to the amount?
A. I moved them with my own hands, throwing them to one

side to extract merchandise that was under them. I might say twenty—thirty, but it would be guess work on my part to do so.

Q. I don't want guess work, I want your best judgment; I do expect you to give your best judgment but not guess work?

A. Well, to my best judgment, twenty or thirty.

Q. Do you know, Mr. Ruppe, the height of that adobe wall from the foundation to the top?

A. If I remember correctly, it was thirteen feet.

Q. What was the height of the room inside your store from floor to ceiling?

A. I think that height was thirteen feet.

291 Q. And how high above the ceiling did the adobes extend on the sides?

Mr. FIELD: I object to that as assuming that they did extend, and as leading and suggestive.

The COURT: Overruled.

Mr. FIELD: Exception.

A. Three feet.

Q. How was the upper portion of the building constructed?

A. It had a set of rafters stretched across from wall to wall.

The COURT: Which direction?

A. From west to east; then there was what I would designate as a truss, roof which was covered with tin.

Q. And how was this roof supported—with the tin?

A. On boards—the boards were laid on the truss and the tin on them.

Q. And what were the trusses supported by?

A. The trusses were supported by the rafters of the roof.

Q. Well, I want to get them to the wall some way?

A. All resting on the wall.

Q. Now, do you know the size of these beams, or what was it you said the ceiling was nailed to—the rafters? Did you call these rafters?

A. The rafters were a foot if I am not mistaken, and the trusses six inches.

292 Q. Is that your best judgment that they were?

A. That is my best recollection, sir.

Q. And to what extent did they penetrate the wall on the side, if you know?

A. Some—in certain places they were exposed—in others not.

Q. What do you mean by they were exposed?

A. Could be seen from the outside.

Q. Penetrated clear through the wall, is that it?

A. Yes, sir.

Q. And now was the roof, the tin roof, nailed on those same rafters or on another set?

A. On others.

Q. And what space was it between those to which the ceiling was nailed and those that sustained the roof?

A. I would say two feet.

Q. How close together were those rafters to which the ceiling was nailed?

A. Between one and a half or two feet.

Q. And how close were those to which the roof was fastened?

A. I believe they were the same, because the braces were nailed to those same rafters.

Q. And to what extent did the rafters sustaining the roof penetrate the wall?

A. I do not know.

Q. Could they be seen at all from the outside?

A. Not the trusses, no sir.

Q. Well, I am talking about the supports of the roof, such as were fastened in the wall, do you understand what I mean?

293 The COURT: He has called them rafters.

Mr. WOOD: He says trusses.

The COURT: He says trusses separated the boards up above. He is calling those which bore the ceiling rafters; I think it will make some confusion if you change the name.

Q. Let me see if I understand you. Were the timber supports, or the lumber supports that ran east and west across the building from wall to wall and sustained the roof—are these what you call trusses?

A. No, sir, I call them rafters.

Q. And you use the same term for those that run from east to west and that the ceiling was nailed to, do you not?

The COURT: They are the same thing, are they not?

Mr. WOOD: I do not understand that they were the same thing.

A. I used the word rafters to designate the big timber which runs across the room from west to east.

The COURT: Was the ceiling fastened to those?

A. Yes, sir.

Q. Well, do you mean, Mr. Ruppe, that the ceiling was fastened to the same set of sticks that run from west to east that support the roof?

294 The COURT: He didn't say sticks ran from west to east supporting the roof. He said trusses separated the roof part, and he has not said whether the- crossed the rafters which ran in the same direction. How was that?

A. The trusses, as I remember, were nailed to the rafters.

The COURT: Well, running in the same direction.

A. Running in the same direction, sir.

Q. Now, are you sure about that, Mr. Ruppe?

A. I would like to be able to refresh my memory with the photograph.

Mr. FIELD: We object to his refreshing his memory.

Q. I show the witness a photograph marked Exhibit F, and I ask now if that is a correct representation of your building as it appeared from the front after the fall?

Mr. FIELD: To all of which we object.
The COURT: Overruled.
Mr. FIELD: Exception.

A. Yes, sir.
Q. Does that refresh your memory as to the supports of the ceiling and the roof?

Mr. MANN: Object to as leading.
The COURT: Overruled.
295 Mr. MANN: Exception.

A. Yes, sir.
Q. Now, the upper sets of supports as shown in that—the ones that support the roof, what is your recollection as to what extent they penetrated the wall, of the portion that fell?

Mr. MANN: Objected to for the reason that the question assumes that the photograph does show such support.
The COURT: I think he better testify to his own knowledge rather than from the photograph.
Mr. WOOD: Question withdrawn.

Q. Do you recollect to what extent the roof supports of your building penetrated the wall, the east wall?

Mr. MANN: Objected to as a repetition and because he has already said that he didn't know.
The COURT: Overruled.
Mr. MANN: Exception.

A. The roof supports rested on the wall and penetrated six inches more or less.
Q. Do you recollect whether any of them could be seen from the outside of the wall before it fell?

Mr. MANN: Objected to as leading and suggestive and cross-examination of his own witness.
296 The COURT: Objection overruled.
Mr. MANN: Exception.

A. I remember distinctly of seeing timbers protruding from the wall—at least, it was not covered with adobe, but I do not remember whether it was the roof support or the ceiling support.
Q. Now, of what was the ceiling composed in that store?
A. Beaded lumber—that is, ceiling lumber.
Q. In which direction did the trusses run?
A. They ran from north to south.
Q. You have said that the roof was of tin, do you know how that was fastened to its supports?
A. That was nailed to the boards.
Q. What was the conditions of the wall on the inside: how was it finished, the east wall?
A. It was covered with blue paper.
Q. Mr. Ruppe, I wish you would describe for us exactly the con-

tents of your store and their arrangement upon the inside as they were just at the time the wall fell and before it fell.

Mr. FIELD: To which we object unless it is shown that the contents asked to be described belonged to the plaintiffs in this case.

Mr. WOOD: I thought we had shown that already.

The COURT: I do not think there is anything about ownership.

Q. Who was the owner of the stock in that store, Mr. Ruppe, if you know?

297 A. Father Di Palma and myself.

Q. Now continue.

A. In walking into the store from the street——

The COURT: Do you want him to describe the fixtures and stock separately or together——

Q. Go on.

A. In entering the store, on the right hand side was a large soda fountain with a counter, seats around it against the wall; there was shelving containing brushes—and on the shelves there were bottles containing tinctures, herbs and other liquid medicines. In front of that shelf there were show cases which contained rubber goods, such as fountain syringes, and then there was a prescription case which stood right across the room, facing the door; and then following it around on the other side, going to the east wall of the store, there was shelving and lockers——

Q. From which end are you describing?

A. From the rear.

Q. Walking along from the rear on the east side toward the front?

A. Yes, sir, toward the front—in which were stored perfumes, cigars, face powder, brushes and goods known as druggists' sundries; the shelving containing all the patent medicines and show cases stood in front of this shelf containing perfumes, face powders and brushes—then there was a little aisle, and fronting the window was a large cigar case which contained the cigars; on top of the cigar case was the cigarette case, then came a bench known as a

298 settee, then an electric piano, with a bench on the other side of it, with a rug on the floor, forming a sitting room, and looking glasses on the wall; a large picture of an elk—an oil painting; then the show window which contained show bottles and merchandise displayed to view.

Q. Did you describe that portion of your store lying back of the prescription case?

A. No, sir.

Q. Tell us what was there.

A. It was where all the fluid extracts, chemicals, tinctures used for prescription compiling were kept; then there was a large partition and behind that was a surplus stock of heavy oils and goods that were carried in quantities.

Q. As the ceiling supports rested upon the floor after the fall, about how far from the east line of the building did they rest upon the floor?

A. About a foot and a half or two feet.

Q. And with reference to their original position had they moved to the north or to the south, or fallen directly down?

A. The east end was towards the north.

Q. How much?

A. Half a foot or so.

Q. Now, go on and describe the condition of the interior of the store after the wall fell.

A. As soon as I could get into the store I made an effort to get at the cash register—could not move it, as one of the rafters with part of the roof lay on it. I immediately procured help and commenced to pick up all the drugs and bottles that were scattered all over
299 the floor, and packed them into boxes; got Trimbles' team to haul them away, and tried to extricate the electric piano which had stood immediately over the excavation in the northeast corner of my store. I could not move it and I had to leave it there for—until the next day. I commenced immediately to move what was not destroyed——

Q. Well, if you will stick a little more closely to my question, which was to describe particularly the interior of the store as it was at that time, we will come to the other part of clearing it up afterward——

A. After the electric piano the cigar case came, that was completely crushed; the show case holding the perfumes had the glasses broken; the brush show case was crushed and all the shelving on the east wall had entirely disappeared, up to that crack.

Q. Had entirely disappeared: had that walked off out of the building?

Mr. MANN: I object to that as leading.

Mr. WOOD: I want to criticise the witness a little for his form of expression.

Mr. MANN: Give us a chance, we will do that.

Mr. FIELD: Perhaps the jury can understand the language of the witness.

A. There was no shelving any more. There were a few pieces of the boards laying there and what merchandise had been on
300 there, with a few bottles thrown out to the middle of the store and into the show cases, was not there any more——

Q. Was not there any more——

A. The merchandise on the shelves.

The COURT: The last thing he said was show cases, I believe.

A. Thrown into the show cases.

Q. Do you mean that they had been taken away, or smashed?

Mr. MANN: Object to that as leading and cross-examination of his own witness.

The COURT: Sustained.

Q. Tell what you mean by around there any more.

A. Had been destroyed and smashed by the wreck, with the exception of those that I have mentioned as picked off of the floor.

Q. Go on and describe the condition of the rest.

A. On the west side the soda fountain was pushed away from the wall. The fruit bowls were crushed; the ice cream freezer was full of adobe; the spoons and holders were scattered around, and the glass tops of the show cases on that side—two of them were also smashed; the oil painting lay in between the electric piano and the roof and I could not get it out that night.

Q. What did you do in the way of clearing up the wreck and removing what remained of the stock?

A. Trimble sent me over their team and I moved the goods
301 that I could get at and what I could find, to the Grant building.

Q. And did you finish that that night?

A. No, sir; I kept working in the ruins pretty near for a week collecting little things: the next day I moved out the back room, and the day following raised the roof and got at the electric piano.

Q. What was the condition of the piano?

A. Completely destroyed.

Q. Now, how far back was the shelving crushed and broken?

A. To where that crack was in the wall, which I believe was fifty or sixty feet.

Q. What, if any, effort did you make to find another place in which to move?

Mr. FIELD: I object to it as wholly irrelevant and immaterial. The defendants did not invite the plaintiffs to engage in business at any other place and are not bound by any business venture that they started elsewhere.

The COURT: I suppose he was bound to do the best he could under the circumstances. I will overrule the objection.

Mr. FIELD: We except.

A. I tried to find a location on that same block, and was talking to Mr. Lewinson, of the Economist——

Mr. FIELD: Defendants object to what he said to anybody else, as res inter alias acta.

302 The COURT: I think that is right: he said he tried to find a place in that block. That may be in.

Mr. WOOD: We will save an exception, upon the ground that the witness cannot clearly and distinctly state what efforts he made to find another place without stating conversations in a measure.

Q. Were you able to find any other place in the block in which your store was located before, that you could move into?

Mr. FIELD: I want it understood that all this class of testimony is going in under the objection on behalf of the defendants; that the evidence of efforts of the plaintiffs to find another location, and what he did in that location is wholly immaterial because the defendants did not invite him to go into any business in any other place.

The COURT: Overruled.

Mr. FIELD: Exception.

A. I could not find any place in the block, after repeated efforts.

Q. Were there any vacant places in the vicinity of your old store at that time?

Mr. FIELD: Same objection.

A. Not until December——

Q. I am talking about the time when the wall fell.

A. No, sir; there were not.

303 Q. You say you moved to the Grant building: where is the Grant building with reference to the store that fell?

A. It is over one block west of my former location.

Q. And on which side of the street?

A. It is on the north side of the street.

Q. North side of what street?

A. Central avenue.

Q. And was there a street between your old location and the Grant building?

A. Yes, sir.

Q. Was that the nearest place to your building that you could find?

Mr. FIELD: Objected to as leading and suggestive and calling for a conclusion of the witness.

The COURT: Sustained.

Q. Were there any other vacant places at that time nearer to the store that fell than the one in the Grant building that you moved into?

Mr. FIELD: Same objection.

The COURT: Overruled.

Mr. FIELD: I do not object that it is leading and suggestive, but the objection which I made to this line of inquiry as before.

The COURT: Overruled.

304 Mr. FIELD: Exception.

A. No, sir.

Q. Is there a center of business in the city of Albuquerque?

Mr. FIELD: Objected to as calling for an opinion of the witness, and a conclusion.

The COURT: Was there at that time, I suppose you mean?

Q. Was there at that time?

The COURT: Objection overruled.

Mr. FIELD: Exception.

A. Yes, sir.

Q. And where is that—where was that business center?

Mr. FIELD: Same objection.

The COURT: Overruled.

Mr. FIELD: Exception.

A. Right in the neighborhood of Second street and Central avenue; the block on Central avenue between Third and Second Streets, and the block on Second street between Gold avenue and Central avenue.

Q. Now, were there any vacant places at that time nearer to this business center than the one you moved to?

The COURT: He has answered that has he not, he said
305 there were none nearer to his store which fell than that and that his store which fell was in the business center.

Mr. WOOD: Perhaps he did, but I think perhaps I would better ask the question in this form.

The COURT: He may answer.

Mr. FIELD: The objection is that all testimony on this line is incompetent, for the reasons heretofore stated.

The COURT: He may answer.

Mr. FIELD: Exception.

A. No, sir.

Q. From your experience as a merchant in Albuquerque, as you have given it, do you know how the building—how the store in the Grant building to which you moved, compared as a business location for a drug store with the store—with the building that fell, that you had formerly occupied?

Mr. FIELD: Objected to as calling for an opinion of the witness on a proposition as to which he is not competent to give an opinion, and upon which opinion evidence is not admissible.

The COURT: Overruled.

Mr. FIELD: Exception.

A. I do.

306 Q. How did it compare?

Mr. FIELD: Same objection.

The COURT: Overruled.

Mr. FIELD: Exception.

A. It was a very inferior location.

Mr. FIELD: I move to strike out the answer of the witness as not responsive.

Mr. WOOD: We think it is responsive.

The COURT: Overruled.

Mr. FIELD: Exception.

Q. Do you know the value by articles, of the property that was damaged and destroyed in that drug store at the time that the wall fell?

Mr. FIELD: I object to that as calling for an opinion of the witness, and because no proper foundation has been laid for it.

The COURT: Overruled.

Mr. FIELD: Exception.

A. Yes, sir.

Q. Are you able to state now from memory just what articles were destroyed of your stock when the building fell?

A. No, sir; I could not, there were too many.

307 Q. Did you, after the fall of the wall, determine and make a list of the articles that were destroyed at that time?

Mr. FIELD: I object to it as leading and suggestive and assuming that the witness was competent to make a list.

Mr. WOOD: I will withdraw that question.

Q. Were you able to remember after the fall of the building, some or all of the articles that were destroyed?

A. Yes, sir.

Q. Did you make any memoranda at that time of the articles that you then remembered as having been destroyed?

Mr. FIELD: Objected to as leading and suggestive.

The COURT: Overruled.

Mr. FIELD: Exception.

A. Yes, sir.

Q. And tell us when and how you made up that memoranda.

A. Immediately upon moving everything, the goods were separated, or rather, I would say classified as druggists do on their shelves, and those bottles and goods that were completely destroyed were put into a book by me; and then I commenced checking the stock, using Mr. Malette and Dr. Baltes who were two clerks in my employ, to assist me in endeavoring to remember what we
308 had on the day of the wreck. This was the only way we had of ascertaining what was missing and destroyed.

Q. Were you able to determine of your own knowledge, after assisting yourself in the manner you have described, with reasonable certainty as to the articles that had been destroyed?

Mr. FIELD: Objected to as leading and suggestive and calling for an opinion of the witness as to what was reasonable certainty.

After argument.

Mr. WOOD: I will withdraw the question.

Q. Tell us whether or not you are able to say with reasonable certainty whether the list as you made it up at that time was a correct one of the property described, as far as you could recollect it at that time.

Mr. FIELD: I object to it as calling for the opinion as to what is reasonable certainty, as to what was in that list, and as not giving the jury the fact or facts from which the list was made up.

The COURT: Sustained.

Q. What did you say as to whether or not the list as you made it up was correct so far as it went, of the articles that had been destroyed?

Mr. FIELD: Object to that for the same reason; it is for him to tell how the list was made up, and for the jury to say whether or not it was correct.

309 The COURT: Overruled.

Mr. FIELD: Exception.

A. Yes, sir, I believe it was a correct list of the articles destroyed.

Q. Were you able to recall or to ascertain in that way all the articles that have been destroyed?

Mr. FIELD: Same objection, and as leading and suggestive and calling for a conclusion and not for facts.

A. Yes, sir.

The COURT: I do not see how he can say as to that.
Mr. WOOD: I will withdraw the last question.

Q. Now, where is that list?
A. That list was in a book that I had here.
Q. When did you last see it and where?
A. I saw it at the trial before last.
Q. The second trial of this case?
A. Yes, sir.
Q. And what was done with it at that time?
A. The book was used in evidence.

Mr. FIELD: I object to that answer because in the first place the witness is mistaken and in the second place if it was used in evidence the record is the best evidence of that fact: your Honor refused to certify it on the ground that it was not in evidence.

The COURT: I will let him finish his answer.

310 Mr. FIELD: I except.

A. The book was used in evidence by me and was laying on the table there the last time I saw it. I used it also in preparing a bill——

Q. I do not care about that. I want to identify it as the last time when you saw it. You say you had it here and used it upon the second trial?
A. Yes, sir.
Q. And have you seen it since that trial?
A. No, sir.
Q. Do you know where it is?
A. No, sir.
Q. Do you know with whom it was left?
A. No, sir.
Q. Now, did you make from that book a copy of the memorandum of the goods lost, which was contained in it?

Mr. FIELD: Objected to as leading and suggestive.
The COURT: Overruled.
Mr. FIELD: Exception.

A. Yes, sir.
Q. And when did you make that copy and for what purpose did you make it?
A. I was ordered by the court to produce a bill of particulars, and made it from that book.
Q. Do you know that that bill of particulars was a correct copy of the memorandum that you made in the book?
Mr. FIELD: Objected to as leading and suggestive.

311 Q. Do you know whether or not it was?

Mr. FIELD: Same objection.

The COURT: Overruled.
Mr. FIELD: Exception.

A. Yes sir, it was.
Q. Will you examine the paper I show you and tell me whether or not that is the bill of particulars you made and have referred to?
A. Yes, sir, it is.
Q. Now, Mr. Ruppe, are you able, with the aid of that bill of particulars, to refresh your recollection as to the articles that were destroyed, and give their value as they were at the time they were destroyed?

Mr. FIELD: Objected to for the reason that the testimony of the witness was that the original list from which this paper is alleged to have been copied was merely an estimate of the witness and others as to what had been lost; for the reason that this paper is not sufficiently shown to be a copy of the original list; and for the reason that no proper foundation has been laid for the introduction of the copy.
The COURT: Overruled.
Mr. FIELD: Exception.

A. Yes, sir.
Q. And will you please do so?

312 Mr. FIELD: We object, for the same reasons.
The COURT: Overruled.
Mr. FIELD: Exception.

A. Inventory of stock lost in wreck of June 30th, 1902——
Q. I didn't ask you to read that. I ask you to refresh your recollection from that, if you can.

The COURT: The Supreme Court said that the document itself could be read. They didn't say that he was confined to his recollection.
Mr. FIELD: I do not understand that they have offered the document and consequently that is not before the court now; if they want to offer it and the court wants to admit it, all we want to ask is for our objection and exception to be noted.
The COURT: It is part of the records of the court—it might be offered.
Mr. WOOD: I do not want to take any chances.
Mr. FIELD: And to the question Please do so, we make the objection that it is not competent for the witness to refresh his recollection from an examination of this paper, a proper foundation for the use of the same by the witness not having been laid.
The COURT: I have ruled that he could refresh his recol-
313 lection.
After discussion.
Mr. WOOD: I will change the question.

Q. Will you please refer to the bill of particulars that you have mentioned and refresh your recollection and tell us what articles were destroyed, and their value?

Mr. FIELD: To which we make the objection that no proper foundation has been laid to permit the witness to use the paper as a means of refreshing his recollection; that no proper foundation has been laid for the use of a memorandum—a copy of the original memorandum, and that there is a total failure of evidence, of the preliminary evidence, upon which the witness might be permitted to use such a paper for the purpose of refreshing his recollection.

The COURT: I will overrule the objection.

Mr. FIELD: Exception.

A. Three-fourths dozen Prickly Ash Bitters, six dollars; seven-twelfths dozen Malt Nutrine, one dollar and twenty-six cents; seven-twelfths dozen Overholt Whiskey, seven dollars; one-sixth dozen Piperazine Water, three dollars; one dozen California Claret, three dollars and fifty cents; one-half dozen White Wine, one dollar and seventy-five cents; three-fourths dozen Brandy, small, four dollars and fifty cents; two dozen Coyote Water, two dollars; eleven-
314 twelfths dozen Hunyadi Water, three dollars and eight cents; one-half dozen Malt Whiskey, one dollar; one-twelfth dozen Hostetter's Bitters, one dollar and twenty-five cents; one lot envelopes, one dollar and forty cents; note paper, fifty cents; one dozen Papetries, three dollars; one pound White Rose Extract, four dollars and fifty cents; one-half pound Heliotrope, two dollars and twenty-five cents; two and three-fourths pounds Red Rose, sixteen dollars and fifty cents; one-twelfth dozen J. M. Farina, ninety cents; one and one-half pounds Crush Rose, nine dollars; one-sixth dozen Frazier's Bitters, one dollar and thirty cents; one-fourth dozen Electric Bitters, two dollars; two and one-half pounds Sachet Powder, ten dollars; twelve pounds Assorted Extracts at three dollars and seventy-five cents, forty-five dollars; Yale's Goods, destroyed and damaged, fifteen dollars; one-third dozen Florida Water, one dollar and eighty-five cents; two-thirds dozen Toilet Water, four dollars ond ninety-six cents; one-fourth dozen Imperial Crown Toilet Water, one dollar; one-fourth dozen Eastman's Florida Water, one dollar; three-fourths dozen Meyer Brothers' Florida Water, three dollars; three looking glasses, seven dollars and fifty cents; two looking glasses at two dollars, four dollars; three looking glasses at one dollar and fifty cents, four dollars and fifty cents; one-sixth dozen Pino's Hair Tonic, one dollar and thirty cents; one-fourth dozen Pino's Hair Tonic, small, one dollar; one-half dozen Lemon Balm, seventy-five cents; one-half dozen Damchusky Hair Dye, two dollars;
315 one-fourth Damchusky Hair Dye, one dollar; one dozen German Cologne, three dollars; one-half dozen Florida Water, two dollars; one-fourth dozen Ayer's Sarsaparilla, two dollars; one-fourth dozen Hood's Sarsaparilla, two dollars; one-fourth dozen Spring Medicine, one dollar and fifty cents; seven-twelfths dozen Manhattan, three dollars and fifty cents; one-twelfth dozen Cuticura Resolvent, eighty-five cents; one-sixth dozen Warner's Safe Cure, one dollar and fifty cents; one-fourth dozen Warner's Liver and Kidney, two dollars; one-twelfth dozen Eskay's Food, fifty cents; one-fourth dozen Malted Milk, one dollar and twenty cents; one-

sixth dozen Malted Milk, large, one dollar and eighty cents; perfumes from show cases, twenty-five cent, fifty cent and seventy-five cent sizes, thirty-three dollars; one cut glass bottle, five dollars; six Toilet Cases, twenty-four dollars and fifty cents; four Handkerchief Boxes, seven dollars; three dozen Perfumery, small, six dollars; one Toilet Case, fourteen dollars. three Collar and Cuff Boxes, three dollars and seventy cents; two Shaving Sets, four dollars; two Shaving Sets, three dollars and twenty-five cents; six pounds Bulk Perfume at five dollars a pound, thirty dollars; four pounds Bulk Perfume at three dollars and seventy-five cents, fifteen dollars; one-fourth dozen San Metto, two dollars; one-half dozen Trommer's Extract of Malt, four dollars; one-half dozen White Pine and Tar, two dollars; one-fourth dozen St. Jacob's Oil, one dollar and eighteen cents; one dozen Rubber Adhesive Plaster, four dollars; one-fourth
316 dozen Espey's Cream, fifty cents; five-twelfths dozen Herpicide, three dollars and fifteen cents; one-fourth dozen Egg Food, fifty-four cents; one-half dozen Kentucky Condition Powders, seventy-five cents; one-fourth dozen Capo Oil, one dollar and seventy cents; one-fourth Hirsutas, two dollars and eighteen cents; one-twelfth dozen Carboline, sixty-three cents; one-sixth dozen Dandruff Cure, one dollar and thirty cents; one-twelfth dozen Petro-Carbol, thirty-five cents; one-fourth dozen Amole Shampoo, fifty cents; one-sixth dozen Tar Shampoo, thirty-five cents; one-half dozen Hooper's Cough Syrup, seventy-five cents; one-half dozen Egg Shampoo, one dollar; one-fourth dozen Piso's Cure for Consumption, fifty cents; one-half dozen Grobe's Chili Tonic, two dollars; one-half dozen Bell's Pine Tar and Honey, one dollar; one-fourth dozen Bovenine, one dollar and twelve cents; one-sixth dozen Ayer's Cherry Pectoral, sixty-seven cents; one-half dozen Winslow's Soothing Syrup, fifty cents; one-fourth dozen Winchell's Teething Syrup, fifty cents; one-half dozen Vaseline Camphor Ice, forty cents; one-fourth dozen Vaseline Camphor Ice, in tubes, eighteen cents; one-fourth dozen Peruna, two dollars; one-fourth dozen Perfume at two dollars and fifty cents, seven dollars and fifty cents; one-half dozen Grape Juice, one dollar and fifty cents; one-twelfth dozen Nerve Tonic, sixty-seven cents; five-twelfths dozen Strengthening Cordial, one dollar and seventy-five cents; one-sixth dozen Miles' Nervine, one dollar and thirty cents; one-fourth dozen Heart Cure, two dollars; one-fourth
317 dozen Tonic, two dollars; one-half dozen Maltine, four dollars; one-sixth dozen Paine's Celery Compound, one dollar and thirty-five cents; one-fourth dozen Green's Nervura, two dollars; one-half dozen Mother's Friend, four dollars; one-half dozen Kodal Dyspepsia Cure, two dollars; seven-twelfths dozen Herbine, two dollars and forty-five cents; one-sixth dozen Sanford's Liver Regulator, one dollar and thirty cents; one-sixth dozen Fellow's Hypophosphites, two dollars; one-twelfth dozen Hagee's Cod Liver Oil, seventy-five cents; one-twelfth dozen Ceroline, seventy-five cents; one-fourth dozen Cod Liver Oil Emulsion, two dollars; one-sixth dozen Ozo Emulsion, one dollar and thirty-five cents; one-fourth dozen Hosford's Acid Phosphate, one dollar; one-fourth dozen Papoid Tablets,

one dollar; one-sixth dozen Stewart's Dyspepsia Tablets, one dollar and thirty cents; one-fourth dozen Catarrh Tablets, seventy cents; one-fourth dozen Swamp Root, two dollars; one-fourth dozen Swamp Root, small, one dollar; one-half dozen Wine of Cardui, four dollars; one-fourth dozen Wine of Cod Liver Oil, two dollars; one-fourth dozen Thialion, two dollars and fifty cents; one-sixth dozen Shoop's Restorative, one dollar and thirty-five cents. one-fourth dozen Chlorides (Platt's), one dollar; one-fourth dozen Pond's Extract, one dollar; one-half dozen Chamberlain's C. C. Remedy, one dollar; one-half dozen Chamberlain's C. C. Remedy, large, two dollars; one dozen Gauze Bandages, one dollar and twenty cents; one-half dozen Gauze Bandages, two-inch,
318 one dollar; damage to suspensories, fifteen dollars; one-half dozen Cod Liver Oil, one dollar and seventy-five cents; one-sixth dozen Eno's Salts, one dollar and forty cents; one-fourth dozen Bromo-Seltzer, two dollars; one-sixth dozen Wizard Oil, one dollar and thirty-five cents; one-quarter dozen Wizard Oil, small, one dollar; one-fourth dozen Pierce's Smart Weed, fifty cents; one-sixth dozen Vapo-Cresoline, seventy cents; cigars destroyed, fifty-seven dollars and ninety cents; cigarettes destroyed, forty dollars and eighty-three cents; one-half dozen Nail Polishers, seventy-five cents; one-half dozen Nail Polishers, large, two dollars; one Toilet Nail set, one dollar; one Toilet Nail Set, ninety cents; one Baby Set, one dollar and thirty-five cents; five dozen Hair Brushes, seventeen dollars and seventy-five cents; six dozen Tooth Brushes, seven dollars and fifty cents; three dozen Cloth Brushes, thirteen dollars and twenyt-five cents; six dozen eight ounce Extracts, four dollars; one-sixth dozen Cut Glass, five dollars; one-half dozen Square, six dollars; one-twelfth dozen Gin, one dollar and twenty-five cents; one and one-half dozen Nail Brushes, four dollars and fifty cents; one dozen Shoe Brushes, one dollar and fifty cents; one-fourth dozen Toilet Boxes, two dollars; one-sixth dozen Small Dusters, one dollar and fifty cents; one-half dozen Picture Frames, one dollar; one-half dozen Picture Frames, medium, one dollar and fifty cents; one-sixth dozen Nail Polishers, one dollar; one-half dozen Rubifoam, one dollar; one dozen Tooth Powder, two dollars; one-half dozen
319 Tooth Soap, eighty-seven cents; one half dozen Tooth Soap sixty-three cents; one-fourth dozen Orodentine, thirty-seven and one-half cents; electric piano, six hundred dollars; extra roller, forty dollars; freight on same, twenty-eight dollars and fifty cents; hauling and drayage, two dollars and fifty cents.

Mr. FIELD: I suppose the witness is permitted to refresh his recollection about the hauling and drayage that he lost in the wreck.

The COURT: No, not that: he can omit that because that is not an article that was lost.

A. (cont.) Three floor show cases, one hundred and fifty dollars; one cigar case, seventy-four dollars; one Cigarette case, ten dollars; one Marble Slab, thirty dollars and sixty cents; one Looking Glass, ten dollars; shelving and brackets for same, one dollar and fifty cents; one Regulator Clock, seven dollars and fifty cents; one-

half dozen Soda Water Holders, large, two dollars and eighty cents; nine Spoons, one dollar and fifty cents; two Essence Bottles, one dollar and fifty cents; one Chocolate Pitcher, one dollar and seventy-five cents; six gallons Syrups, nine dollars; two gallons of Ice Cream, two dollars and fifty cents; Crush Fruits and Bowls, two dollars; four Bowls, six dollars; one Lemon Knife, seventy-five cents; four chairs, one dollar and sixty-five cents apiece, six dollars and sixty cents;
Elk Painting, twenty-five dollars; frame for same, ten dol-
320 lars; back Shelving, Closets and Perfumery Case, two hundred and twenty-five dollars; two Front Glass for show case, six dollars; one Top Plate Glass fifteen dollars; two Terra Cotta Busts, two dollars; two Window Show Globes, nine dollars; Window Curtain Poles and Carpet, twenty dollars; Gas Fixtures, Drops, Cigar Lighter, twenty-nine dollars and twenty cents; Office Chair, one dollar and fifty cents; Ladies' Desk, six dollars and fifty cents; Glass in sponge case, two dollars; Doors in show case, two dollars and fifty cents; Looking glass for same, three dollars.

Mr. WOOD: Is that all?

A. Yes, sir, except the items that the court instructed me to leave out.

Q. Can you give the details of those items as you have testified to them?

Mr. FIELD: We make the same exception.

The COURT: He would have to deduct from the total he has there.

Mr. WOOD: I will withdraw that question.

And now the hour of 5 o'clock p. m. having arrived, the court adjourned until tomorrow morning, April 2nd, 1910, at 9:30 a. m.

And now on this April 2nd, 1910, at 9:30 a. m. court met pursuant to adjournment, and trial proceeded.

Mr. BERNARD RUPPE resumed the witness stand.

321 Direct examination continued by Mr. WOOD:

Q. Can you tell us what, if any, expenses were incurred by you in removing from the Weinman building to the Grant building, in moving your stock?

Mr. FIELD: To which we object as wholly immaterial.

The COURT: I believe we went through that before and I admitted it. I will overrule the objection.

Mr. FIELD: We except.

A. The expense of hauling—I had to move the goods—the expense of a watchman; carpentry work; tearing down the fixtures and replacing them in the new location.

Q. Did you repair any of the fixtures or furniture that were damaged in the fall?

Mr. FIELD: I object to that as leading.

The COURT: Overruled.

Mr. FIELD: We except.

A. Yes, sir.
Q. Now, can you tell us from memory the expenses you incurred in the particulars you have mentioned?
Mr. FIELD: That question can be answered yes or no.
A. No, sir.
Q. Did you, at the time of incurring those expenses, make a record of their amounts?

322 Mr. FIELD: Objected to as leading.
The COURT: Overruled.
Mr. FIELD: We except.

A. Yes, sir.
Q. And where did you make the record, or memorandum?
A. From the bills.
Q. In what place did you make it; where did you make it?
A. I made it in the bill of particulars.
Q. Did you have it in any book or paper, or elsewhere before you put it in the bill of particulars?
A. Yes, sir, I had bills for the same.
Q. At the time you put it into the bill of particulars did you then know whether or not the amounts so put in were correct?

Mr. FIELD: Objected to because it appears that the witness had bills, which are the best evidence of the expense.
Mr. WOOD: I think his memory is the best evidence, if he can recollect.
The COURT: Objection overruled.
Mr. FIELD: Exception.

A. I did.
323 Q. By referring to the bill of particulars can you refresh your memory and tell us the amount of the expenses so incurred?
Mr. FIELD: Objected to because no proper foundation has been laid for such question.
The COURT: He said he had bills at that time.
Mr. WOOD: He said he had, originally, bills for the amounts—at that time—but that he knew at the time he put it in the bill of particulars what the amount was, and that the amount in the bill of particulars was correct. It already appears that the bill of particulars was made up very shortly after the damage.
Mr. FIELD: I wish to make the proposition here, that where it appears that a witness has had in his possession primary written evidence of fact, and fails to account for that primary evidence, that secondary evidence is utterly inadmissible and not to be received at all. It is not sufficient to show that the primary evidence is not at present available, but it is necessary to show that he did not voluntarily put the primary evidence out of his possession.
Mr. WOOD: Before the counsel argues this I will go into fact about these bills and will withdraw these questions for the present, and will ask the witness another question.

Q. Mr. Ruppe, you say you had bills for the amount you paid for these claims: do you know where those bills are?

Mr. FIELD: This is for the court, properly, I think, and not for the jury.

Mr. WOOD: We think it is all for the jury.

The COURT: I do not know about that: the question is as to laying the foundation for secondary evidence.

Mr. WOOD: I do not care.

The COURT: This is not to go to the jury for the present; I will see what he says about it.

A. Yes, sir.

Q. Where are they?

A. I think I have them in my possession still.

Q. At the store?

A. Yes, sir, I had them here at the last trial.

Q. I will pass that point for the present, then. What do these bills cover?

The COURT: This is for the court merely—that is, which items do they cover?

Mr. WOOD: Yes.

A. To the best of my recollection, I have a bill from Trimble for hauling; one from the colored drayman; a bill for the work, from Hayden; a bill from Hudson, for glass.

Q. I will ask you to examine this bill of particulars as to the items which you have not already covered, and tell me what, if any, items contained on that bill of particulars you did not have bills
325 for, but knew at the time from memory.

A. (Witness examining papers.) I have not the bill for hauling of the electric piano, nor the freight thereon.

The COURT: You better take one at a time, I think.

Q. Pass that and go to those further down, Mr. Ruppe.

Mr. FIELD: I do not see why Mr. Wood should not get this information from the witness wtihout putting it into this record.

The COURT: As they are items from which he depended upon his memory, I think it ought to go in.

A. I believe I have a receipt for every one except those I mentioned.

Q. Mr. Ruppe, in giving your testimony you said that the value of the piano was six hundred dollars. Was that the value of the piano at your place?

Mr. FIELD: I object to that as leading and suggestive and because the witness didn't say so.

The COURT: Sustained: I think it is leading.

Mr. FIELD: When Mr. Ruppe read from that paper he said electric piano, six hundred dollars; that is what he said.

Q. Do you know what the value of the electric piano was in your place of business at the time of the fall of the wall?

326 A. Yes, sir.
Q. And how much was it?

Mr. MANN: We object to this for the reason that no proper foundation has been laid.
The COURT: Overruled.
Mr. MANN: Exception.

A. Six hundred and seventy-four dollars and fifty cents.
Q. Mr. Ruppe, in addition to the property which you have testified to as having been destroyed, was there other property damaged?

Mr. FIELD: We object to that as leading and suggestive and calling for a conclusion.
The COURT: Objection overruled.
Mr. FIELD: Exception.

A. Yes, sir.
Q. What did you do, if anything, in the way of ascertaining the property so damaged?
A. I separated the damaged property and sold it at a reduced price.

Mr. MANN: I move to strike that out as not responsive.

Q. Have you finished your answer?
A. Yes, sir.

The COURT: The last part of what he answered is not responsive. The first part was that he separated it from the other property,
327 and the jury will not consider the statement about selling them, but only that he separated them from the other property.

Q. You say you separated it: tell us just what you did and how you separated it, and what you did with it after you separated it.

Mr. MANN: I object to that as leading and suggestive.
The COURT: Objection overruled.
Mr. MANN: We except.

A. I ascertained the wholesale value of the same——

Mr. FIELD: I move to strike that out.
The COURT: It is not responsive.

Q. I want to know what you did with that property: how did you separate it?
The COURT: Repeat the former question.

And thereupon the former question was read to the witness.

A. The goods partially damaged, soiled, were taken out of the wreck stock, put on to the shelf and table and sold.
Q. Did you examine all those goods that you say were so—that were damaged?

Mr. FIELD: We object to that as leading and suggestive.
328 The COURT: Objection sustained.

Q. And tell us, Mr. Ruppe, what goods, as near as you can, were

so damaged and what the damage to them was, or what the condition of them was, I mean.

Mr. FIELD: I object, as no proper foundation has been laid for the latter part of the question, and as calling for a conclusion of the witness.

The COURT: Condition, and not the damage?

Mr. WOOD: I will withdraw the question.

Q. Will you tell us the condition of those goods that you say were injured?

A. Patent medicines—had their wrappers off; some were soiled, dirty from adobe dust—all brushes were soiled, the backs were scratched; toilet sets—the outside boxes were broken and the goods were unfit for display purposes.

Mr. FIELD: I object to the latter part of the answer as not called for, and ask to have it stricken out.

The COURT: The last part of it, unfit for display purposes, may be stricken out.

Q. Can you tell us, now, from memory, what goods were so injured?

Mr. FIELD: We make the same objection, that no proper foundation has been laid for this question; and the further objection that goods of this character are not within the issues in the case
329 and not within the bill of particulars.

The COURT: I supposed it was covered by the pleadings, but perhaps not.

Mr. FIELD: Your Honor went against us on this at the last trial.

The COURT: I suppose I must have looked at the pleadings then; the objection is overruled.

Mr. FIELD: We except.

A. There were hair brushes———

Mr. WOOD: As you go along, will you please give us your best recollection?

Mr. MANN: The question is, can he tell?

The COURT: You have asked a question which he has not an-answered——

Mr. WOOD: He is just beginning to answer.

Thereupon, the former question was read to the witness.

A. I can, to a certain extent.

Q. Now, tell us, as far as you can, the goods that were so injured.

Mr. FIELD: Same objection, that no proper foundation has been laid for this testimony, and injuries of this character are not within the issues of the pleadings and not embraced in the bill of particulars.

330 The COURT: Objection overruled.

Mr. FIELD: We except.

Mr. WOOD: I wish to add to this question, in order that the witness may be more specific.

Q. Give us, as near as you can recollect, your best judgment as to the number of each, as you go along—as near as you can.

Mr. FIELD: I object to the question in the form in which it is put, as calling upon the witness for his best judgment, and not the best recollection, which is all he can give.

Q. Your best recollection.

The COURT: Leaving out the judgment?
Mr. WOOD: Yes.
The COURT: Then, of course, your objection is repeated to this question.
Mr. FIELD: Except the objection which I make fundamentally to the question: I did not object to his asking the witness for his best recollection.

A. I can not state definitely the quantity of each article——
Q. Go on.
A. There were hair brushes, tooth brushes, cloth brushes, military sets, perfumes in boxes, some abdominal supports, shoulder
331 braces, some chamois skins, papeterie, that is, envelopes and boxes of paper, some note paper, some envelopes; there were some Radways Ready Relief, Swaynes Panacea, Hostetter's Bitters, Extract of Malt, baby rattles, that is about all I can remember at present.
Q. Can you recollect anything else than those that you have given?

Mr. MANN: I object to that as leading, and cross-examination of his own witness.
The COURT: Objection overruled.
Mr. FIELD: Exception.
Mr. MANN: Exception.

A. I believe there were some thermometers there.
Mr. MANN: I move to strike out that answer as not responsive.
The COURT: He said he believed; he was asked if he could remember.

A. I remember, then, that there were some thermometers there.
Q. You say there were brushes there: how many different kinds of brushes, what kind?

Mr. FIELD: I object to that as leading and suggestive and as cross-examination of his own witness.
332 The COURT: Objection sustained. He said once he could not remember the numbers of particular things.
Mr. WOOD: I might ask him what kind of brushes.
Mr. FIELD: He described several kinds of brushes.
The COURT: He mentioned two or three kinds, I believe.

Q. What kind of brushes were there?

Mr. MANN: I object, for the same reason.

The COURT: He has stated: I do not care to have the evidence repeated.

Q. Were there any brushes other than those you have stated there that you recollect?

Mr. FIELD: Objected to as cross-examination of his own witness.

The COURT: Objection sustained.

Q. Did you, from your examination of those articles at that time, determine their value: did you know their value at the time you separated them?

Mr. FIELD: Objected to as leading and suggestive.

The COURT: That is, the whole lot of separated articles?

Mr. WOOD: Of the whole lot.

333 Q. Did you know the value of these articles that you have described, at the time—as they existed before—as their value was before the injury?

Mr. MANN: Objected to as leading, and for the further reason that proper foundation has not been laid to give testimony as to the value of these articles.

The COURT: Objection overruled.

Mr. MANN: Exception: that is your question, I understand it refers to this lot of damaged goods which he says he separated out from the other goods not damaged——

A. Yes, sir.

Q. What was the value of those goods and all of them that you then separated out as damaged—as their value was immediately before the fall of the wall?

Mr. MANN: I object to that as leading, and for the further reason that no proper foundation has been laid for this testimony, and that this is not the proper way to prove the value.

The COURT: I do not quite understand what you mean by proper foundation. He says he was in the drug business for thirty-five years, and saw these goods. I will overrule the objection.

Mr. MANN: We except.

A. Eight hundred dollars.

334 Q. Do you know what the value of those damaged goods, as you have described them, was, in their damaged condition immediately after the fall of the wall and after you separated them?

A. Yes, sir.

Q. And what was that value?

Mr. MANN: I object, for the same reason as to the former question.

The COURT: Objection overruled.

Mr. MANN: Exception.

A. Three hundred dollars.

Q. Mr. Ruppe, did you keep track of the total cash receipts from your business during the time when you were in the Weinman building?

Mr. MANN: Objected to as incompetent, irrelevant and immaterial.

Mr. FIELD: And as grossly leading and suggestive.

The COURT: I think it may be leading. The objection is sustained.

Q. Can you now, from memory, state the daily cash receipts from your business while you were in the Weinman building?

Mr. MANN: Objected to for the same reason, and that it is leading and suggestive.

The COURT: Objection overruled.

Mr. MANN: Exception.

335 A. No, sir.

Q. Did you determine those receipts as they occurred each day?

Mr. FIELD: Objected to as leading and suggestive and calling for a conclusion of the witness.

Mr. WOOD: I am unable to know how I can get the witness's attention directed to this fact other than by calling his attention to it.

The COURT: It seems that it would be easy enough to find out whether he had any system of keeping his cash, and if so, what it was. I do not see that there would be any difficulty in doing that. I will sustain this objection.

Mr. WOOD: We except.

Q. Did you have any system of keeping a record of your cash receipts?

Mr. FIELD: Objected to as leading and suggestive and calling for a conclusion on the part of the witness.

The COURT: Objection overruled.

Mr. FIELD: Exception.

A. Yes, sir.

Q. Describe what that system was.

Mr. FIELD: Objected to as no proper foundation has been laid for the introduction of evidence of this character—evidence
336 of his cash receipts and expenditures is wholly immaterial on the issues of this case.

The COURT: Objection overruled.

Mr. FIELD: Exception.

A. I have a cash book in which are entered the daily sales.

Q. How do you determine the amount of those daily sales, for entry in the cash book?

Mr. FIELD: Objected to as wholly irrelevant and immaterial.

The COURT: Objection overruled.

Mr. FIELD: Exception.

A. By the cash register.

Q. Describe how you kept them upon the cash register.

Mr. FIELD: Objected to, for the same reason.
The COURT: Overruled.
Mr. FIELD: Exception: and no proper foundation has been laid for it.
The COURT: I do not know just what you mean by that. He said he could not remember them.
Mr. FIELD: We think there are elementary rules being violated here and we want to save the points in the record.
337 The COURT: Go on.

A. The sales made for cash, and credit sales paid for are punched up in the cash register: then when the business is closed, the amount is figured from the cash register; the cash is counted and put into the cash book.
Q. You say when the business is closed: how often is that done?
A. Generally daily.
Q. Who did that work of figuring the cash register and counting the sales of your business during the time that you were in the Weinman building?
A. I did.

Mr. MANN: To save time, we wish to have the same objection noted to each of these questions.
The COURT: Yes—objection overruled.
Mr. MANN: Has the Court any objection to noting objections to all these questions: the general objection that the cash receipts are not proper testimony and do not tend to prove any issues in this case, and that no proper foundation is laid for this testimony?
The COURT: You can enter that and I will overrule the objections.
Mr. MANN: And note our exceptions.

338 Q. Are the amounts of those daily sales, as you have described them, entered in the book which I show you, covering the period of your business in the Weinman building—of the daily cash receipts?

Mr. FIELD: Objected to as leading and suggestive, and because no proper foundation has been laid for testimony of this character.
The COURT: Objection overruled.
Mr. FIELD: Exception.

A. (Witness examining the book:) Yes, sir.
Q. Tell us whether or not you knew those entries to be correct and to correctly state the amount of your daily sales, at the time you made them.

Mr. FIELD: Objected to because of no proper foundation for the question, and because it calls for an opinion and conclusion of the witness.
The COURT: Objection overruled.
Mr. FIELD: Exception.

A. Yes, sir.

Q. Can you, by refreshing your memory from those entries, recollect and be able to state the amount of your cash receipts from your business during each day that you were in the Weinman building?

339 Mr. MANN: Objected to as incompetent, irrelevant and immaterial, and no proper foundation has been laid; and for the further reason that it is an attempt to swear into this case a portion of the books which are the primary evidence of the facts called for.

Mr. WOOD: I merely asked him if he can do it.

Mr. MANN: And I object to it also as leading and suggestive.

The COURT: It is immaterial whether he can or not if he would not be allowed to after he said he could.

Mr. WOOD: I will state frankly my purpose. It is my belief that the proper way to prove the matters in question is the way I am following, and I want to carry it along to the point where the record shall show that I made an offer to prove it.

The COURT: He can answer whether he is able to, or not.

Mr. MANN: Exception.

A. Yes, sir.

Q. Now, will you please refresh your recollection from the memorandum which I have shown you, contained in the book marked Cash Book, and tell us the daily receipts from your business during the time that you were in the Weinman building?

Mr. MANN: I object, for the same reason just given to the
340 preceding question.

The COURT: Objection sustained.

Mr. WOOD: I ask that the objection be repeated.

The COURT: It is in the record, and it need not go in twice. It can go [illegible]ad.

Thereupon, the last objection was read.

The COURT: The objection is repeated to this question. I will sustain the objection.

Mr. WOOD: I am afraid your Honor is leaving the record in a bad shape in sustaining the objection as it stands, because the objection, as placed on the same grounds, is untenable, so that I would ask that your Honor either specify the grounds upon which you sustain the objection, or ask the gentlemen to put their objection to this question again, for the purpose of the record.

The COURT: He said he wanted to put it in the same words, so I see no need for repeating it, but I shall sustain it on the next to the last ground specified, that is, an attempt to introduce the books under the guise of the witness's memory.

Mr. WOOD: We except to the ruling of the Court upon that ground.

Q. Now, Mr. Ruppe, will you tell us what books of account you kept of your business during the time that you were in the
341 Weinman building?

Mr. FIELD: To which we object as wholly immaterial and irrelevant, and because there is no issue in this case upon which the book kept by Mr. Ruppe would shed any light.

The COURT: Objection overruled.

Mr. FIELD: Exception.

A. I kept a cash book, soda fountain book and a ledger.

Q. Tell me all the books you kept.

A. Those are the only books that I kept; day book—I forgot to mention—day book, cash book, soda fountain book and ledger.

Q. Did you keep any record—any book record, of your purchases?

Mr. FIELD: Objected to as leading and suggestive.

The COURT: Objection overruled.

Mr. FIELD: Exception.

A. No, sir.

Q. Have you the books here, Mr. Ruppe, in which you kept the record of your business during that period of time?

A. Yes, sir.

Q. Now, do these books cover the record of your business during the entire period of time covered by the lease from Weinman to you, that has been offered in evidence?

342 Mr. MANN: I object to that as leading and suggestive, and as calling for a conclusion.

The COURT: Objection overruled.

Mr. MANN: Exception.

A. They do.

Q. Will you produce each and all of the books that you have described as containing those records?

Mr. FIELD: We make the objection to these books that no proper foundation has been laid for the introduction of any books such as these; that there is no issue in this case upon which the books could shed any light, and that the evidence fails to show that the books are such books as would be admissible under any state of case, to prove anything.

The COURT: He has not offered the books yet: he merely asked the witness to produce them.

A. Yes, sir.

Q. Who kept these books, Mr. Ruppe?

A. The day books were used by everyone who made a sale; the cash book was kept by myself; the soda water book was kept by the soda water man, and the ledger was posted by some of the clerks and sometimes myself.

Q. What clerks did you have at the time you were in the Weinman building, and what were the duties of each one?

343 A. Mr. Millette and myself and Lily Burgess were working in the store during the day time; Dr. Baltes part of the time was the night man, and Willie Burgess ran the soda fountain.

Q. Were those all of the clerks that you had at that time?

A. I had another man doing night work before Mr. Baltes came, but I do not remember his name.

Q. Where are these men now, that you have mentioned?

A. Dr. Baltes is here; Willie Burgess is here; Lily Burgess is here; and Mr. Millette—I do not know where he is, except by hearsay; and the night man whose name I do not remember, I do not know where he is located at present.

Q. In the conduct of your business, what items pertaining to it were entered upon your day books?

Mr. MANN: I object to that for the reason that the day book itself is the best evidence of what it contains.

The COURT: I suppose he refers to the class of entries.

Mr. WOOD: Yes. I will state that we expect to offer these books in evidence.

The COURT: I think he could describe his general system of book-keeping, in order to give aid in examining the books.

Mr. MANN: Exception.

344 A. The sales made on credit, and cash paid for—credit sales.

Q. And what were contained in your cash book?

Mr. MANN: I object, for the reason that the cash book itself is the best evidence of what it contains.

The COURT: Well, what kind of entries?

Mr. WOOD: Question withdrawn.

Q. What kind of entries did you make in your cash book?

Mr. FIELD: We object, for the same reason; the book will show what kind, and the jury are able to tell.

The COURT: Objection overruled.

Mr. FIELD: Exception.

A. The cash book showed the daily receipts. The sums taken by various clerks, out of the cash drawer; miscellaneous small items paid out of the cash drawer, small cash purchases made in town.

Mr. FIELD: I move to strike out the answer of the witness on the ground that it is testiony as to the contents of the cash book in his construction of the entries, and it is not competent testimony.

The COURT: Objection overruled.

Mr. FIELD: Exception.

345 Q. And what class of entries were made in your ledger?

Mr. MANN: Same objection.

The COURT: Objection overruled.

Mr. MANN: Exception.

A. The individual credit accounts.

Q. How did you keep the moneys coming in from your business, after taking them from the cash register: what did you do with them?

Mr. FIELD: I object to that as wholly irrelevant and immaterial.

The COURT: Objection overruled.
Mr. FIELD: Exception.

A. Deposited them in the bank.
Q. What, if any records did you keep of your transactions with the bank?
A. Nothing more but the *the* pass book and my check book.
Q. Have you the pass book and your check book here, covering that period of time?
A. No, sir.
Q. Where are they, if you know?
A. Not having any use for them, I destroyed them—threw them away.
Q. When did you destroy them?
A. When I destroyed an accumulated amount of bills and
346 books and such things as that I had no use for.
Q. When?
The COURT: That is for that period to which you refer?
Mr. WOOD: Yes.
A. I feel reasonably certain, when I moved into the N. T. Armijo building.
Q. That is your present location?
A. Yes, sir.
The COURT: You didn't tell when that was.
A. About January, 1904.
Q. Now, from that time on until the termination of this lease——

Mr. FIELD: It seems to me that there is no dispute that this man was in the N. T. Armijo building for more than a few months during the life of this lease.
Mr. WOOD: I think that is so. He says he moved into the N. T. Armijo building in January, 1904.

Q. Well, what is your best recollection as to whether or not it was before or after the termination of the lease in question here that you destroyed those?

Mr. MANN: I object to that as leading and suggestive and cross-examination of his own witness.
The COURT: Objection sustained.

Q. Have you now the records: your bank book or your
347 check books covering any part of the period down to December, 1903—down to January, 1904?
A. I have no bank book nor no check book.
Q. Have you searched for them?
A. Yes, sir.
Q. When did you search for them?
A. At the last term—time of the trial when I was asked to hunt for them.
Q. When was that?
A. That was last December.
Q. Were you able to find them?

Mr. FIELD: I object to that as wholly immaterial. The witness has testified that he destroyed them.

Mr. WOOD: We think the gentleman is not consistent in his objections.

THE COURT: Objection overruled.

Mr. FIELD: Exception.

A. No, sir.

Q. Mr. Ruppe, when was your attention first called to any claim that those books were needed in the trial of this case?

Mr. FIELD: I object, as wholly immaterial: the presumption of law is that Mr. Ruppe knew the importance of these matters.

Mr. MANN: And for the further reason that it is cross-examination of his own witness.

348 Mr. WOOD: If it is a presumption of law that he knew it, it is certainly important for us to rebut that presumption by the facts.

THE COURT: Objection overruled.

Mr. FIELD: Exception.

A. At the last trial, in December.

Q. Were you present at each of the former trials?

Mr. MANN: I object to it as incompetent, irrelevant and immaterial, and cross-examination of his own witness.

THE COURT: Objection overruled.

Mr. MANN: Exception.

A. Yes, sir.

Q. And did you testify on each of those occasions?

Mr. FIELD: Same objection.

The COURT: Exception overruled.

Mr. FIELD: Exception.

A. Yes, sir.

Q. And were you cross-examined on each of those cases by counsel representing the defendants in this case?

349 Mr. FIELD: Same objection.

The COURT: Objection overruled.

Mr. FIELD: Exception.

A. Yes, sir.

Q. Did they, at either of the first two trials of this cause, or did anyone, call for those check books or bank books that you now say have been destroyed?

Mr. MANN: Objected to, for the same reason, and further, on behalf of Defendant Weinman because of the fact that if his counsel, at the first two trials overlooked something, that he certainly should not now be held for that.

Mr. FIELD: And on behalf of Mr. Barnett I object that: all of it is testimony for the purpose of laying foundation for secondary evidence, and is not competent to go to the jury in any case, and tends to mislead the jury as to what they are called upon to try, and

because the question of what may have been done or left undone at any former trial of this case, does not change the rules of evidence.

The COURT: Objection overruled.

Mr. FIELD: Exception.

A. No sir.

Q. Will you turn to the cash book, Mr. Ruppe, and identify what number, part or pages in it contain the record of your cash
350 receipts during the period that you were in the Weinman building?

Mr. FIELD: To which we object because no proper foundation has been laid for these cash books on this trial, for any purpose whatever.

The COURT: The book has not been introduced in evidence as yet.

Mr. WOOD: It was my purpose to introduce only so much of it as pertained to the portion of time in question.

The COURT: You can do that.

Mr. FIELD: Exception.

A. (Witness referring to book.) On page thirty-eight, the sixteenth to the thirty-first, inclusive.

The COURT: Of what?

A. December.

The COURT: What year?

A. 1901; page 40, January cash account; page 42, February cash account; page 44, March cash account; page 46, April cash account; page 48, May cash account; page 50, June cash account.

Q. That covered the period of your stay in the Weinman block, did it not?

A. Yes, sir.

Q. Now what pages of that book contain the items of
351 small cash disbursements that you described in answer to a former question, during the same period of time?

Mr. MANN: Same objection.

The COURT: Overruled.

Mr. MANN: Exception.

A. Pages 39; 41; 43; 45; 47; 49; 51.

Mr. WOOD: We offer in evidence the pages of this book which have been identified by the witness.

Mr. MANN: To which we except for the reason that the same is incompetent, irrelevant and immaterial, and does not tend to prove any of the issues in this case; and for the further reason that this cash book purports to be a portion of a system of bookkeeping, part of which the witness himself has voluntarily destroyed since this case was pending.

Mr. FIELD: I wish to make an objection also, if the Court please, on behalf of Defendant Barnett, to the introduction of parts of this book now offered, because when it is attempted to prove loss of profits in such a case as this, it is necessary that the parties relying on such

evidence shall present at least such a complete set of accounts as will enable a bookkeeper to ascertain the amount of capital employed in the business, the expense of conducting it, its income and profits, from the books themselves, and that it is incompetent to
352 offer anything less than a complete system of accounts of such character as is indicated; and such accounts, when offered, as the basis of proof of loss of profits, cannot be supplemented by oral testimony of estimates of profits; the books and accounts offered in evidence must be reasonably complete in themselves and must appear to have been a reasonably complete set of accounts and not a mutilated set or part of a set, or less than such a set of accounts as is indicated by the objection.

The COURT: Objection overruled.

Mr. FIELD: Exception.

Mr. MANN: Exception.

Thereupon, the identified portions of the cash book referred to by the witness were marked, parts of cash book, Plaintiff's exhibit L.

Q. From these pages that have been offered in evidence, have you made a computation by months of your total cash receipts from that business during the time that you were in the Weinman building?

The COURT: That can be answered yes or no.

A. Yes, sir.

Q. To aid us in applying this evidence, will you give us your computation in totals by months, beginning with the time you went into the Weinman building under that lease, and ending at the time of the fall of the wall?

353 Mr. FIELD: I object, for the reason that evidence of this character is incompetent for any purpose unless accompanied by similar evidence as to disbursements and such a set of accounts as will enable a bookkeeper to take the accounts and verify the results of the witness's testimony. In other words that it is incompetent to present a part of the set of books and from that to attempt to show receipts without showing also the disbursements in the same way by similar evidence, so that the question of loss of profits, if any, can be verified.

Mr. MANN: Defendant Weinman joins in this objection, and further objects for the reason that it is shown by this witness that this book is only a part of the system of bookkeeping, a part of which system was voluntarily destroyed by the witness.

Mr. WOOD: I expect, of course, to follow this testimony with other testimony as to disbursements.

The COURT: I was about to say that only a part could be shown at a time. The objections are overruled.

Mr. MANN: Exception.

Mr. FIELD: Exception.

A. Yes, sir.

Mr. WOOD: I will have the last question read to the witness.

181

Thereupon, the last question was read.

Q. Before answering that question read to you: you stated in your former answers that the receipts of the soda fountain, I think, were contained in another book of that name: does the cash book which you have been shown, and the leaves of which have been offered in evidence, contain the returns from the soda fountain?

A. Let me look at it.

Mr. MANN: I object to it as leading, and cross-examination of his own witness.

The COURT: Objection overruled.

Mr. MANN: Exception.

A. With the exception of the month of April and May the cash book shows it.

Q. And as to those months of April and May, of what year?

A. 1902.

Q. Have you the figures for those months, the receipts form the soda fountain?

Mr. MANN: Objected to, for the same reason.

The COURT: Objection overruled.

Mr. MANN: Exception.

A. Yes, sir.

Q. Now, I ask the witness to proceed and give us the computations except for the months which he says are not in there,

355 the months of April and May——

Mr. MANN: Same objection.

The COURT: Overruled.

Mr. MANN: Exception.

A. In December, 1901, sixteen days, $1,056.30—cash sales.

Q. Cash sales or cash receipts.

A. Cash receipts: January, 1902, $1,829.15; February, $1,808.77; March, $2,237.02; April, $2,564.77, May, $2,234.40; June, $2,455.90, making a total of $14,186.31.

Q. Now Mr. Ruppe, can you tell us whether or not in your business as a druggist you had any system of selling prices from which you can determine the amount of your receipts from the sale of goods over their cost price to you?

Mr. FIELD: Objected to as leading and suggestive and calling for a conclusion of the witness and not for facts.

The COURT: Objection overruled.

Mr. FIELD: Exception.

A. Yes, sir.

Q. Tell the jury, please, what that was.

Mr. MANN: Same objection.

Mr. FIELD: And is not the proper way of proving loss of

356 profits.

The COURT: Objections overruled.

Mr. FIELD: Exception.

A. A good many of the medicines came with the price marked thereon; others we figured the cost, and what they are worth at retail is marked thereon, prescriptions are compounded and the profit is figured on the drugs and the time used in preparing the same. Certain goods such as sundries and articles of luxury are generally figured at a percentage ranging from fifty to one hundred per cent; prescription compounding must bring more than one hundred per cent, patent medicine profits range all the way from 25 to 35 per cent; in my experience as a druggist, in figuring the profits that I have made in my business I figure that my business produced me an average of 40 per cent gross.

Mr. MANN: We move to strike the answer out as not responsive.

Mr. FIELD: Also as not a basis of any legal recovery in any case, and as not evidence of the amount of profit which was lost by the plaintiffs, and as not competent to go to the jury as a means of estimating the loss, of profits if any.

The COURT: Objection overruled.

Mr. FIELD: Exception.

357 Q. Mr. Ruppe, in answering the last question you finally said that you figured your profits at 40 per cent gross, what do you mean by figured?

Mr. MANN: Objected to as cross-examination of his own witness.

The COURT: I think that all that he had said before that really came into that; he had already explained what he meant by figured, but possibly that part of it didn't apply. I will overrule the objection.

Mr. FIELD: Exception.

A. My knowledge of the business permits me to state that I make 40 per cent on my sales.

Mr. FIELD: We ask to strike out the answer of the witness because that is not an answer to the question to begin with, and in the second place, it is incompetent to prove the extent of the profits to the plaintiffs by such evidence.

Mr. MANN: Further, that the figures he has given do not represent his sales, but are of his cash receipts.

The COURT: Well, this last question was what he meant by the word or expression "figured." He has told what he meant and I do not see why that should be stricken out.

Mr. MANN: Exception.

358 Q. Now, Mr. Ruppe, have you computed, upon the basis that you have stated, your gross profits by the month, during the period you were in the Weinman building.

Mr. MANN: Objected to for the same reason that we assigned to the other question; if your Honor desires to have it re-stated we will do so.

The COURT: I do not care to have it re-stated myself. It is overruled.

Mr. MANN: Exception.

A. Yes, sir.

Q. Will you state what they were by months, by that computation?

Mr. FIELD: Same objection.

The COURT: Objection overruled.

Mr. FIELD: Exception.

The COURT: The total for that.

A. (Witness referring to memoranda) The half of December, 1901——

The COURT: He gave the total before: if he gives the total, why is it necessary to go into months?

Mr. MANN: We make the same objection to this.

The COURT: Objection overruled.

Mr. MANN: Exception.

359 Mr. WOOD: I want to show the increase of gross profits by month during that five month period.

The COURT: Proceed: the objection is overruled.

Mr. MANN: We except.

A. The gross profits for the half of December, 1901, were $422.52; for January, $731.66, that is 1902; for February, $723.50; March, $894.80; for April, $1,025.90; May, $893.76; June, $982.38, and making a total gross profit of $5,674.52.

Q. Now, Mr. Ruppe, do you know what your expense of operating the business was during that period of time?

Mr. FIELD: I object to that because it is not competent in such an inquiry as this, to show receipts by books and expenditures by oral testimony; but in order to lay a foundation for recovery of loss of profits, there must be such a system of accounts presented as will enable a bookkeeper to take those accounts and, with reasonable certainty, determine the extent of the profits.

The COURT: Perhaps he is going to say no to that question.

Mr. FIELD: I assume he is going to say yes.

Mr. MANN: The Defendant Weinman also offers his further objection that a part of the system of bookkeeping which would show the expenditures according to the question, witness has him-

360 self, voluntarily destroyed.

Mr. WOOD: I do not know where the counsel gets a basis for saying that.

The COURT: Objection overruled.

Mr. FIELD: Exception.

Mr. MANN: Exception.

A. Yes, sir.

Q. Now, have you, in any of your books, kept a complete record of your expense account?

A. No, sir.

Q. Have you kept, in any of your books, any other record of your expense account than the ones which you described as being in the cash book, and which are already in evidence?

Mr. MANN: Objected to as cross-examination of his own witness?
The COURT: Objection overruled.
Mr. MANN: Exception.

A. No, sir.
Q. State, if you can then, Mr. Ruppe, what your monthly expenses were in the operation of that business during the time that you were in the Weinman building.

Mr. FIELD: To which we object for the reasons assigned by me.

361 Mr. MANN: And to which Defendant Weinman joins, and for the further reason assigned in the preceding objection.
The COURT: Objections overruled.
Mr. MANN: Exception.
Mr. FIELD: Exception.

A. One-half of December, 1901—$217; January, $434; February, $434; March $434; April, $434; May, $434; June, $434; making a total of expense of $2,821.

Mr. MANN: Defendant Weinman moves to strike out the answer of the witness for the same reason given as in the objection to the question.
Mr. FIELD: And Defendant Barnett for the reason that it affirmatively appears that it is no more than the estimate of the witness of the amount of expenditure.
The COURT: Overruled.
Mr. MANN: Exception.
Mr. FIELD: Exception.

Q. Now, can you give us the average daily cash receipts by the month, for the period of time in question?

362 Mr. FIELD: To which we make the same objection.
The COURT: He may answer.
Mr. FIELD: Exception.
Mr. MANN: Exception.

A. Yes, sir.
Q. Please give them.

Mr. FIELD: We make the same objection.
The COURT: Objection overruled.
Mr. FIELD: We except.
A. Yes, sir.

The COURT: He asked you to give them.
A. Half of December, 1901, the average daily sales were $66.01; in January, 1902, the average sales were $59.15; in February, [illegible], in March, $72.16; in April, $85.49; in May, $72.07; in June, $81.86, making an average for the whole period of $72.01.

Mr. MANN: Now, the defendant Weinman moves to strike out the answer as not responsive to the question. He was asked to give the daily cash receipts, and proceeds to give the daily cash sales.
The COURT: I suppose his testimony referred to receipts.

Mr. WOOD: I think Judge Mann is right.

363 Q. In answer to my last question you said daily sales: did you mean sales or did you mean daily cash receipts?

Mr. FIELD: We object, that it is cross-examination of his own witness, and leading and suggestive.
The COURT: Objection overruled.
Mr. FIELD: Exception.

A. I figure everything sold in the drug store, which is punched up, as cash receipts—as a cash sale on the day received.
Mr. MANN: We move to strike this out as not responsive to the question.
The COURT: It may be stricken out.
Q. What I asked you was whether the figures you have just given were cash sales, each day—that is, average cash sales, or average cash receipts.

Mr. FIELD: Same objection.
The COURT: Objection overruled.
Mr. FIELD: Exception.

A. Cash receipts.
Q. Now, do you know, Mr. Ruppe, what your cash sales were during that time, or what relation they bore to your cash receipts—your total sales—I did not mean cash sales: what your total
364 daily sales *was* during that time: what proportion they bore to your total daily receipts, if you know.

Mr. MANN: Objected to as incompetent, irrelevant and immaterial, and an attempt to bring in oral testimony for facts of which the books are the best evidence.
Mr. FIELD: And as calling for a conclusion and opinion of the witness, and not for facts.
The COURT: I think he testified that when he received cash on account of merchandise sold, that he put it through the cash register and it appeared in receipts for the day.
Mr. WOOD: Yes, the day when received, although it might have been made earlier, and that a sale made on credit did not appear in these figures.
Mr. MANN: That has no bearing whatever on the question. He is asking him what proportion of his business was cash business.
Mr. WOOD: No, no.
After argument.
The COURT: I do not think I understand your question myself.
Mr. WOOD: I will change the question.

Q. Do you know what your average daily sales were during that period.

365 Mr. FIELD: Objected to, as an attempt to supplement the books of account of the plaintiff, by oral testimony, and as asking for an estimate by the witness, and not for facts.
The COURT: He can answer yes or no.
Mr. FIELD: Exception.

A. Yes, sir.
Q. What were they?

Mr. FIELD: Same objection.
The COURT: I think it should appear how he knows.
Mr. WOOD: I wanted to ask that question.

Q. How do you know? How did you ascertain and how do you know what the daily sales were during that time?

Mr. MANN: We make the objection that this is cross-examination of his own witness.

The COURT: By what means?
A. By computation that I made from the books.
Q. What figures—what books—what sources did you make the computation from?

Mr. MANN: Same objection.
The COURT: Objection overruled.
366 Mr. MANN: Exception.

A. From the cash book and the ledger.
Q. What did you say as to how your average daily sales compared in amount with your average daily receipts, if you know how they compared in amounts?

Mr. FIELD: I object to it as calling for an opinion of the witness, and not for facts.
Mr. MANN: And for the further reason that it is an attempt to prove orally what the witness has already stated the books show, and the books themselves are the primary evidence of the facts.
After argument.
Mr. WOOD: Question withdrawn.

Q. Did you keep in your books a record each day of the total daily sales?

Mr. FIELD: I object to that as asking the witness for the contents of the book.
The COURT: Objection overruled.
Mr. FIELD: Exception.

A. No, sir.
Q. How, then, can you tell us the daily sales or the average daily sales?

Mr. FIELD: I object to that as cross-examination of his own witness.
367 The COURT: Objection overruled.
Mr. FIELD: Exception.

A. By figuring at the end of the month the outstanding accounts due me, and that showed me that my business between cash and credit was the same on the average.

Mr. FIELD: We ask to strike out the answer of the witness as not responsive to the question, and as stating a conclusion of the witness and not a fact.

The COURT: The first part of it, that he did it by figuring it at the end of the month, I think is responsive, the rest of it is not.

Mr. WOOD: The last part is not responsive, although I will ask him that now.

Q. Now, from the figures that you made in the way you have stated, can you tell us how your average daily sales during each month compared with your average daily receipts that you have given here: can you tell us that?

Mr. FIELD: I object to it as calling for a conclusion of the witness, and asking for his opinion and not for facts, and that if he states the facts the jury can make the computations.

The COURT: Objection sustained.

Mr. WOOD: We except.

368 Q. Mr. Ruppe, do you know the total amount of capital that was invested in your business during the time that you were in the Weinman block?

Mr. FIELD: I object to that as an attempt to supplement the books of account which the witness says he has produced here.

The COURT: Objection overruled.

Mr. FIELD: Exception.

A. Yes, sir.

Q. And what was the total amount of capital invested in your business during that time?

Mr. FIELD: Same objection.

The COURT: Objection overruled.

Mr. FIELD: Exception.

A. Between eleven and twelve thousand dollars.

Q. Do you know what the ordinary rates of interest on money was here in Albuquerque during that time?

Mr. FIELD: I object to that as irrelevant and incompetent and wholly immaterial in this case. The statute prescribes a rate of interest where no other rate is agreed upon, and what the rate of interest was between statutory rate and the conventioneal rate permitted by the statute, is wholly irrelevant and not a proper subject of inquiry in this case.

369 The COURT: Objection overruled.

Mr. FIELD: Exception.

A. Yes, sir.

Q. What was it?

Mr. FIELD: I object, for the same reason.

The COURT: Objection overruled.

Mr. FIELD: Exception.

A. Ten per cent.

Q. Now, Mr. Ruppe, have you computed similarly your total cash receipts by the month during the time you were in the Grant building?

Mr. MANN: Same objection as to the same question with reference to the Weinman building.

Mr. FIELD: I suppose this may all go in under exactly the identical objections and exceptions that were made to the six and one-half months in the Weinman building, can it not?

Mr. WOOD: I think perhaps I have not proved yet how long he was in the Grant building.

Mr. FIELD: As I understand it, the gentleman is about to go over exactly the same line of proof with reference to the Grant building that he went over with reference to the Weinman building, and we can save some time if it can be understood that this
370 testimony goes in under the same objections and rulings and exceptions as that similar testimony as to the Weinman building.

The COURT: Yes. His answer will show how long he was there, and it may proceed as counsel have suggested unless you see some objection.

Mr. WOOD: I see none.

A. Yes, sir.

Q. Proceed and give them, please.

A. July, 1902, $1,222.50; August, $1,346.10; September, $1,467.50; October, $1,546.85; November, $1,405.10; December, fourteen days, $619.21, making a total of $7,607.36.

Q. Now, will you tell us if you have computed on the forty per cent basis that you stated before the gross profits during the entire period that you were in the Grant building—that is, the total, not by the month?

A. Yes, sir.

Q. How much was that?

A. The gross profits were $3,042.95.

Q. Now, do you recollect what your monthly expenses were while you were in the Grant building?

A. Yes, sir.

Q. And what were they, monthly?

A. $434.

Q. And what were your total expenses during the whole period of time that you were in the Grant building?

A. $2,373.44.

371 Q. Now, have you computed the total difference between your gross profits and your expenses during all the time that you were in the Weinman building?

The COURT. I thought he had given that.

Mr. WOOD: No, I did not ask him for that in detail.

A. Yes, sir.

Q. What is that total difference between the gross profits and the expenses while you were in the Weinman building?

A. The total is $2,853.50.

Q. Now, what were your total net profits during the time you were in the Grant building, similarly computed?

A. $670.51.
Q. When did you leave the Grant building?
A. The 14th day of December, 1902.
Q. And where did you remove to then?
Mr. FIELD: We make the objection that we did not invite him to go into business at any other place, that what he did in any other place is wholly immaterial, irrelevant and incompetent.

The COURT: Objection overruled.
Mr. FIELD: Exception.
Mr. MANN: On behalf of defendant Weinman, I offer the objection also that it is not shown that the conditions were
372 the same as in the Weinman building—carrying the same amount of stock, or anything.
Mr. WOOD: It has been shown that they were very different.
The COURT: I will overrule the objection.
Mr. MANN: Exception.

A. I moved to my present location in the N. T. Armijo building.
Q. Now, where was that location with reference to the business center of the city, as you have already described it?

Mr. FIELD: I object to that as calling for a conclusion of the witness, there having been no competent legal evidence of any business center of the city. If he can locate the place the jury can say where it is with reference to the business center of the city.
The COURT: Objection overruled.
Mr. FIELD: Exception.

A. It was closer to the business center, but on the opposite side of the street where I was formerly located.
Q. Tell us, what, if any, effort you made after removing to the Grant building, to find a more favorable location?

Mr. FIELD: I object to that as incompetent, irrelevant and immaterial, the proposition of law involved, as we understand
373 it, being that if he could not find a favorable location to go into business, he had no right to go into business at all——
The COURT: As I understand, I think he was bound to do the best he could to relieve the defendants from any claim he might have on them for damages. Objection overruled.
Mr. FIELD: Exception.

A. I tried to rent the Barnett corner, or the one at present occupied by Mr. Mateon. I saw Mr. Lewinson, of the Economist, and tried to rent half of his store.
Mr. FIELD: I move to strike out the answer of the witness as testimony of transactions between himself and other persons in the absence of the defendants, by which they are not bound, and as giving his conclusion of what he did, and not the facts.
The COURT: Objection overruled.
Mr. FIELD: Exception.

Q. How soon was the Barnett building completed and ready for occupancy, if you know?

Mr. FIELD: Same objection, and it is wholly irrelevant and immaterial.

The COURT: I think that is following it rather too far.

Q. Did you succeed in getting either of those buildings that you tried to get?

374 Mr. FIELD: Same objection.

The COURT: Objection overruled.

Mr. FIELD: Exception.

A. No, sir, I did not.

Q. Were you able to find, at or prior to the time that you removed into the Armijo building, any location nearer to the business center than you have described, as you have described it—than the Armijo building?

Mr. FIELD: Same objection.

The COURT: Objection overruled.

Mr. FIELD: Exception.

A. No, sir, I could not; it was the only vacant one.

Q. Do you know, from your experience as a business man in Albuquerque as you have testified to it, how the stand in the N. T. Armijo building to which you removed, compared as a business location for the drug business, with the stand in the Grant building.

Mr. FIELD: Objected to as calling for expert testimony on a subject as to which expert testimony is not admissible. The witness has not shown himself to be an expert on this particular subject, and furthermore, it calls for a conclusion of the witness, and not for facts, and the comparison can be made by the jury just as well as by the witness.

375 The COURT: Objection overruled.

Mr. FIELD: Exception.

A. The N. T. Armijo building was better than the Grant building.

Q. And how did the location in the Armijo building compare with the location in the Weinman building?

Mr. FIELD: Same objection.

The COURT: Objection overruled.

Mr. FIELD: Exception.

A. The location I occupy at present is inferior to the one I formerly occupied in the Weinman building.

Mr. FIELD: I move to strike out the answer as clearly a conclusion of the witness and not a fact, and because it is not testimony as to a fact at all.

The COURT: Objection overruled.

Mr. FIELD: Exception.

Q. Now, did you remain in the Armijo building until after the expiration of the term of this lease?

Mr. FIELD: Objected to as leading and suggestive.

The COURT: Overruled.

376 Mr. FIELD: Exception.

A. Yes, sir.

Q. Mr. Ruppe, have you made computation from the books—have you, for the time you went into the Armijo building until the limit of the time specified in this lease?

Mr. MANN: I assume this goes in under the same ruling?

The COURT: Yes, it can.

Mr. MANN: And our exceptions?

The COURT: Yes.

A. Yes, sir.

Q. Now, please state the computation.

A. Seventeen days in December, 1902, $1,106.50——

Q. What year did you say that was?

A. 1902—January, 1903, $1,921.20; February, $1,370.10; March, $1,723.55; April, $2,117.40; May, $1,930.96; June, $1,846.55; July, $2,198.46; August, $2,219.95; September, $1,845.60; October, $1,848.83; November, $1,491.90; part of December, $955.05.

Q. What part of December was that, Mr. Ruppe?

A. First half of the month; fifteen days: making a total of $22,576.05.

Q. Do you know what the monthly expenses were of operating the business during that period of time?

377 A. Yes, sir.

Q. How much were they per month?

A. $434.00.

Q. Have you computed the total difference between your total cash receipts and your total expenditures during the time that you were in the Armijo building, to the 15th of December, 1903?

A. Yes, sir.

Q. And what is that total difference?

A. The difference is $9,030.41.

Q. The difference is what?

A. I misunderstood you—$3,807.85.

Q. Now, have you computed your average daily cash receipts during the time you were in the Grant building?

A. Yes, sir.

Q. And what are your daily sales during that whole period?

A. $45.54.

Q. What was your average daily receipts during the time you were in the Armijo building, down to the 15th day of December, 1903?

A. $61.68.

Q. Mr. Ruppe, can you tell us how much capital you had invested in your business while you were in the Grant building—in the Armijo building, during the period during which you have just testified.

Mr. FIELD: To which we object. This is an attempt to supplement a set of accounts by oral testimony, and it is incompetent for the plaintiffs in this case to prove loss of profits otherwise

378 than by a set of books from which the extent of the business can be reasonably ascertained and the extent of the profits reasonably ascertained, by a competent bookkeeper.

The COURT: Objection overruled.

Mr. FIELD: Exception.

A. Yes, sir.
Q. How much capital was invested in your business?
A. Between eleven and twelve thousand dollars.
Q. The same as in the Weinman building?

Mr. MANN: This is objected to as leading and suggestive and cross-examination of his own witness.
The COURT: Objection overruled.
Mr. MANN: Exception.
A. Yes, sir.

Q. Do you know what was the rate of interest ordinarily received on moneys during that period: do you know what the ordinary rate of interest was which money was earning in Albuquerque during that period while you were in the Grant building and the Armijo building?

Mr. FIELD: The same objection is made that we made to that question a while ago.
The COURT: Objection overruled.
379 Mr. FIELD: Exception.

A. Yes, sir.
Q. How much was it?
A. Ten per cent.
Q. Now, these total cash receipts, as you have given them—was any portion of the cash receipts which you have testified to as having received while in the Grant building, the proceeds of sales on credit made while you were in the Weinman building?

Mr. FIELD: Objected to as leading and suggestive and as an attempt to supplement the evidence of the books by oral testimony.
The COURT: I do not know whether his books would show that whether it was so or not.
Mr. WOOD: I think, in one sense perhaps, the books do deal with that subject and I will withdraw the question.
Q. Now, Mr. Ruppe, have you identified all the books in which you kept the record of your business as you have testified to during the period covered by this lease?

Mr. FIELD: I object to that as leading and suggestive and asking the witness to summarize his testimony.
The COURT: Objection overruled.
Mr. FIELD: He has testified that he destroyed some of the
380 books.
The COURT: I suppose they are identified by that statement that he destroyed them.
Mr. FIELD: I think that is a comment by the court, as to the weight of the evidence, to which I object.
Q. What is the book which I show you now——

Mr. WOOD: I think I did not have the cash book marked: I wish to have the cash book marked.

Thereupon, the book referred to was marked plaintiffs' exhibit L.

Mr. MANN: Is that book in evidence?

Mr. WOOD: Certain pages of it identified by the witness are.

Mr. MANN: It seems to me the whole book should go in.

Mr. FIELD: And no part of the book is any evidence unless the entire, complete set of books of a system and every one of them, is offered.

The COURT: As to this book, I held before, that it was in for the purpose of cross-examination: I do not quite remember now whether I required them to put it in entirely when they offered a portion: I should hold that it is all in for cross-examination, when it comes to that.

Mr. WOOD: We consider that it would be improper for us to offer matters from these books, which are pertinent to the case.

381 The COURT: The book will have to be considered in for such examination as the defendants see fit to make of it; the entire book.

Mr. WOOD: We will save our rights, and except to so much of your Honor's ruling as holds that any portion of the book is to be considered in evidence, save what we have offered.

The COURT: The purpose of your examination may not carry you beyond these pages, but if the cross-examination goes further, I shall hold that the whole book is in for cross-examination.

Q. What is the book which I now show you?

A. This is the soda water book.

Q. What record does that contain, covering the period of this lease?

Mr. FIELD: Objected to as calling for a conclusion of the witness. The book will show for itself.

Mr. WOOD: Question withdrawn.

Q. What pages of that book contain the record of the soda water business during the period covered by the lease?

Mr. FIELD: Same objection: the book will show for itself.

The COURT: Objection overruled.

Mr. FIELD: Exception.

382 A. It covers the whole period.

Q. What pages?

A. Pages eighty-five, eighty-eight—or eighty-six, then eighty-eight—ninety-two, ninety-four, ninety-six, ninety-eight, one hundred, one hundred and two—then one hundred and six, one hundred and seven, one hundred and eight, one hundred and nine, one hundred and ten, one hundred and eleven, one hundred and twelve, one hundred and thirteen, one hundred and fourteen, one hundred and fifteen, one hundred and sixteen, one hundred and seventeen, one hundred and eighteen, one hundred and nineteen——

The COURT: What is the use of this: can he not go from one page to another, inclusive?

Mr. WOOD: If they are consecutively in there.

Mr. *Marron*: They are not.

A. (Cont.) Some pages are blank; I am calling them off, I

am giving those where it is right on. One hundred and twenty-one, one hundred and twenty-two, one hundred and twenty-three.

Q. Who kept that book?

A. In the Weinman building it was kept by Burgess; in the Grant building, partly by myself during that period of the lease.

Q. You say it was partly kept by yourself?

A. Yes, sir.

Q. By whom else in the Grant building?

A. I think—I cannot remember exactly, whose figures
383 these are.

Q. Who kept it in the Armijo building?

A. William Burgess went to work for me, then, again.

Q. Did he keep it?

A. Yes, sir, whenever he worked at the soda fountain: he had kept books.

Q. Well, did William Burgess keep that book during the time you were in the Armijo building?

A. Yes, sir.

Q. All of it?

A. Yes, it looks like his writing.

Mr. MANN: I ask to strike out the answer of the witness "it looks like his writing" as not responsive.

The COURT: Yes.

Mr. WOOD: I consent to that.

Q. Was the record of cash received from the soda fountain business kept in any other way than the entries on the book that you have just identified?

Mr. FIELD: Objected to as leading and suggestive.

The COURT: Objection overruled.

Mr. FIELD: Exception.

A. It was kept separate during the day, and then run through the cash register, until I bought a separate register for it.

Q. Well, during the time—did you have a separate register
384 for it during any of the time covered by this lease?

Mr. FIELD: Objected to as leading and suggestive.

The COURT: Objection overruled.

Mr. FIELD: Exception.

A. No, sir.

Q. Now, explain how it was run through the cash register.

Mr. FIELD: I object to that as incompetent and calling for a conclusion of the witness, and not for facts.

The COURT: Objection overruled.

Mr. FIELD: Exception.

A. At night time, when the soda fountain was closed, the cash was counted.

Q. By whom?

A. By the soda water man—Burgess, and then added to the cash receipts in the register.

Q. How was it recorded on the register?

Mr. FIELD: Same objection.

A. Punched up into the register.
The COURT: Overruled.
Mr. FIELD: Exception.

Q. Along with the other cash—the same?
A. Yes, sir.
885 Q. Recorded in the same way as the other?
A. Yes, sir.
Q. On the same button?

Mr. MANN: I object to that as leading and suggestive.
Mr. WOOD: The last part of it is leading, I will agree to that.
The COURT: Objection sustained.

Q. Was there not a separate button on your cash register, marked soda fountain, on which those records were punched?

Mr. FIELD: Objected to as leading and suggestive.
The COURT: Objection sustained.
Mr. WOOD: We offer in evidence the book which the witness has identified as the soda fountain book.
Mr. MANN: The defendants object to the introduction of this book in evidence, for the reason that the same is incompetent, irrelevant and immaterial to the issues in this case, and for the further reason that it appears to be only one of the system of books, a portion of which system, as shown by this witness, was voluntarily destroyed by him.
Mr. FIELD: And further, it affirmatively appears from the testimony of the witness that no system of accounts was kept whereby the capital invested in the business, the receipts or expend-
886 itures or profits could be reasonably ascertained.
The COURT: Objections overruled.
Mr. FIELD: Exception.
Mr. MANN: Exception.

Thereupon the book was marked plaintiffs' exhibit M.

Q. Will you please pick out the day books that were used by you in your business during the time—the period of time covered by the lease?
A. (Witness selecting books.) Here is one, here is another, here is another, here is another, here is another—five day books.
Q. Are those all of the day books kept by you during that time?
A. Yes, sir.

Mr. WOOD: We offer these five books in evidence.
Mr. FIELD: We make the same objection to these five books that we did to the other book.
The COURT: Objection overruled.
Mr. FIELD: Exception.
Mr. WOOD: The plaintiffs desire to show, in connection with the objections now made, that they are offering these books pursuant to

the ruling of the court upon the objections of the defendants that we must produce here and offer in evidence, all the books of
387 account kept by the witness, not because we believed it was a proper method of proving it, but in deference to the ruling of the court.

Mr. FIELD: We object to that statement on the record.

Mr. MANN: And as an improper statement to be made before the jury in this case.

The COURT: It may be stricken out.

Mr. FIELD: We want it out, or the jury told not to consider it.

The COURT: The jury will not consider that statement as one made to them, but to the court, and not in any way, made for their consideration.

Thereupon, the day books offered in evidence were marked plaintiffs' exhibits N 1 to N 5, inclusive.

Q. Have you a ledger which you have identified as part of your business? If so, produce it.

A. Yes.

Q. Is the book which you have here, the ledger which you kept in your business?

A. Yes, sir.

Mr. WOOD: We offer that ledger in evidence.

Mr. FIELD: We make the same objection to the ledger that we made to the other books—we may have another objection after examining the books.

388 Mr. WOOD: We have the pages here now that were cut from that ledger, and I am going to offer them.

Mr. FIELD: What are the pages?

Mr. WOOD: Two hundred thirteen and two hundred fourteen.

Mr. FIELD: We make now, the general objection that the book as presented is in a mutilated condition, pages 213 and 214 being obviously cut out, and others which I will specify when my attention is called to the numbers—otherwise, I will ask an opportunity to look through it now.

Mr. WOOD: 181-2-3-4 were also cut out.

Mr. FIELD: And the further objection that pages 181 to 184, inclusive, have been taken out, and that the book, upon its face, is mutilated by erasures and the marking out of lines, and is otherwise unintelligible; and that all the books offered by the plaintiffs do not comprise a whole system of accounts, as testified to by him; that he had a pass book and a check book which were part of this system and which he intentionally destroyed after the rights of the parties to this action became fixed.

The COURT: Objection overruled.

Mr. FIELD: Exception.

Thereupon said ledger was marked Plaintiffs' Exhibit O-1.

389 And now, the hour of 12:40 p. m. having arrived, the Court adjourned until Monday morning, April 4, 1910, at 9:30 o'clock a. m.

And now, on this 4th day of April, 1910, at 9:30 a. m. pursuant to adjournment, the trial of this cause proceeds:

BERNARD RUPPE resumed the witness stand for further direct examination, and testified as follows:

Mr. FIELD: On behalf of the defendants, I desire to make application for an alternative order by the court either that the cause be continued—either that we be allowed an opportunity to get Mr. Cullodon here or that we be allowed to read his testimony.

The COURT: I think the jury better retire while this is being discussed.

Thereupon the jury retired to their room.

Mr. FIELD: I received on yesterday a letter from Mr. Cullodon, dated April 1st, 1910, from Senorita, New Mexico.

Thereupon, Mr. Field read into the record said letter, which is in words and figures following, to-wit:

"SENORITA, NEW MEXICO, *April* 1, 1910.

DEAR SIR: Having been sick and didn't go to the postoffice until thirtieth of March was considered it too late to start and not
390 having the means of transportation to hand—very sorry that things were such.

Very truly yours,

WILLIAM CULLODON."

Mr. FIELD: I have been unable to see my client, but I desire to file an affidavit, as one is required, showing that we relied upon obtaining the presence of Mr. Cullodon here without a subpœna; that we communicated with him promptly when the case was set for trial; that this was the result; and that we cannot have him now and can have him at another term of the court. Of course, if the court will permit us to read the testimony of Cullodon here as it appears in the printed record of the other trial, or as given in the last trial of the case, we do not desire to have him——

The COURT: He testified twice.

Mr. FIELD: Yes, sir.

The COURT: I do not know whether his testimony differs.

Mr. FIELD: I do not know that there is any substantial difference, but if necessary, we will have his testimony transcribed, or we will use it as in the printed record of the trial before.

Mr. WOOD: I do not see, if your Honor please, that anything has been added to what appeared on the opening day of his term.
391 Mr. Cullodon does not say in his letter that he is unable to come, save that he can not afford the expense.

The COURT: Well, they cannot get word to him now to get him here.

Mr. WOOD: That may be true, but ordinary diligence would have required these gentlemen, as they were carefully warned that we

would insist upon the trial—reasonable diligence should have required them to make these preparations in advance, which they did not do. He should have been subpœnaed and then he would be here—that would be reasonable diligence. That was not done. Your Honor will recall a controversy over this very witness, at both terms. Now, we submit that this witness could have been here. He says in his letter he is willing to come, save as a matter of expense; that goes to show that he is not—that there is no reason why he could not come. They have not used anything like reasonable diligence in getting him. We submit they have shown no ground whatever for delay.

The COURT: It is not in formal shape, but I suppose it could be put so; that if he were here he would testify to so and so.

Mr. FIELD: On the question of diligence, we submit that the witness could not have been compelled to come here on subpœna: that he is more than one hundred miles away and outside of the
392 county.

The COURT: Where is this witness?

Mr. FIELD: It is considerably over a hundred miles from here, my information is.

Mr. WOOD: Where is there a statute which so provides, I have not been able to find one, it may be there—which prevents subpœnaing a witness more than a hundred miles distant?

After argument.

The COURT: I would be inclined to allow the evidence to be read unless it appears that it would be harmful to have it read.

Mr. WOOD: Our wish to have Mr. Cullodon here is because we think that his testimony, as given by him with his appearance, would be much more satisfactory than any possible reading of his testimony can be—and I understand they agree with us.

Mr. MANN: It is our loss, and not theirs, as we see it.

Mr. FIELD: We wanted him here, and we think we used what the law calls diligence to get him here.

After further argument.

The COURT: You cross-examined him?

Mr. WOOD: Yes.

The COURT: And you think his testimony at the last trial was substantially different?

393 Mr. WOOD: As to reading the testimony, there is no question whatever that it should be the testimony given at the last trial.

Mr. FIELD: We are willing that the testimony of both trials can be read.

Mr. WOOD: If this is done, I suggest we should be allowed to have the testimony given at the former trial, and to show contradictory statements made on the former trial.

Mr. FIELD: We will agree to, of course.

The COURT: Yes: merely that he would so testify, if here, if it is read.

Mr. Wood: I do not want to be contentious or unfair about this. Now, if the evidence of the last trial may be written out and we — permitted, by the printed records of the two former trials, to show contradiction in his testimony, if any, then we will consent to having it read.

After further argument.

Mr. Wood: My proposition is, if the gentlemen will consent that the former records are correct and that I may use them for any purpose I choose, to contradict the evidence of the witness, then we consent that they may use the testimony of the witness at the last trial.

394 Mr. Field: We also desire to use the testimony of the former trials where we think they corroborate the testimony here. We will read what we please and they may read what they please, of the testimony on the former trials.

The Court: I do not think it should rest on agreement, or that the agreement should go any further than that the parties should be left to their rights on the former testimony, accepting the written record of what the testimony was; what Mr. Wood has a right to put in, he can; and what you have a right to put in, you can put in.

Mr. Field: That is satisfactory to us.

Mr. Wood: The printed record to stand as the testimony of the witness?

The Court: Yes: that neither side be put to the proof that that is what he said, but that it be taken as what he said on the former trial, and that the testimony he gave on the last trial shall be transcribed for use at this trial.

Mr. Field: We request the stenographer to transcribe the testimony of the witness.

The Court: Then we will make ready to proceed with the trial.

Mr. Field: That obviates the necessity of filing any affidavit in support of this letter.

395 Mr. Wood: Yes: we do not ask that.

The Court: Yes.

Thereupon, the jury returned to the jury box.

Mr. Ruppe resumed the witness stand and testified further, as follows, upon direct examination:

Q. Mr. Ruppe, will you please tell me what the documents which I show you, marked in printed pages 213, 214, 183, 184—181, 182; what they are?

Mr. Field: To which we object, as calling for a conclusion of the witness, and because the papers should prove themselves.

The Court: I do not understand him to ask what the contents of the paper are.

Mr. Wood: No; merely to identify them.

The Court: He may answer.

Mr. Field: Exception.

A. These are the papers from that large ledger—leaves from that large ledger.

Q. Do they belong in the large ledger which is exhibit O, here?

Mr. FIELD: I object to that as leading and suggestive.

The COURT: Objection overruled.

396 Mr. FIELD: Exception.

A. Yes, sir.

Mr. WOOD: That is all on that subject. I do not know that, under the identification of the witness, I am required to offer those leaves in evidence; I understand they are identified as loos leaves from the ledger, and will be in evidence by the offer of the ledger in evidence. If that be not true, I will offer them here.

Mr. FIELD: If offered in evidence, we make the objection that they are not identified by legal evidence; that they show upon their face—these pages, that they are not free from suspicion of fraud, in the language of the statute of the territory.

The COURT: I think it might be well for the testimony as to them to be finished first.

Mr. FIELD: They are blotted, mutilated and unintelligible. It is impossible from the dates—from the papers, to tell the dates on which the various entries purport to have been made; and further, on its face it purports to be an effort on the part of the plaintiffs to manufacture evidence for themselves.

The COURT: I think it might have been desirable for the witness to testify further as to how they came to be loose, and where they have been, and so on.

Mr. WOOD: I thought that was properly a matter for cross-examination, but at the Court's suggestion, I am glad to go into it.

397 Mr. FIELD: Was our objection passed upon?

The COURT: I suggested, in view of the objection, that we examine the witness further on some of the points suggested by the counsel. The statute requires that the court be satisfied, upon inspection, that they bear no marks or appearance of fraud. The court wants to be satisfied further as to how they became loose. I have not yet looked at it myself.

Mr. FIELD: Defendants except.

Mr. WOOD: I had not offered them yet: I merely made the suggestion whether or not it was necessary to offer them.

Q. Mr. Ruppe, do you know when these leaves were removed from the ledger, Exhibit O?

Mr. FIELD: Objected to as leading and suggestive and calling for a conclusion of the witness.

The COURT: Objection overruled.

A. February of last year.

Q. And who removed them, if you know?

A. I did.

Q. For what purpose did you remove them?

Mr. FIELD: Same objection, and the further objection that the purpose of the witness in removing them is wholly immaterial.

The COURT: Objection overruled.

398 Mr. FIELD: Exception.

Mr. WOOD: Now, if your Honor please, these gentlemen are trying to ride two horses——

After argument.

The COURT: I have ruled that you can go along.

Mr. WOOD: If your Hanor please, what I wish to state is this, for the benefit of the court and not for the jury: that the gentlemen have objected, upon the one hand, that they claim that these pages were removed for the purpose of destroying evidence, and on the other hand, that it is immaterial what the motive was.

The COURT: What am I going to do about it?

Mr. MANN: We desire to except to the statement of counsel in the presence of the jury.

The COURT: The jury are not to consider this statement: the statement is addressed to the court, on the question of the admissibility of evidence, and has no bearing upon the case for the consideration of the jury.

Mr. WOOD: I will stand on the question:

Q. For what purpose did you remove them?

A. So that I would not have to copy item after item and make out a new statement.

399 Q. New statement for whom, and for what purpose?

Mr. MANN: Same objection.

A. For Father Di Palma.

The COURT: Objection overruled.

Mr. MANN: Exception.

Q. Now, you say you cut these out on February of last year?

A. Yes, sir.

Q. When was it, if you know, that the former judgment of this case was reversed and a new trial ordered?

Mr. MANN: I object to that as incompetent, irrelevant and immaterial and not the best evidence, the record of the court being the best evidence.

Mr. WOOD: I will change that question.

Q. At that time did you know that there would ever be any other trial of this action, or believe——

Mr. MANN: Objected to as leading, incompetent, irrelevant and immaterial.

The COURT: Objection overruled.

Mr. MANN: Exception.

A. No, sir.

The COURT: He has not told what he did with the leaves.

400 Q. What did you do with them at that time, Mr. Ruppe, at the time you cut them from the book?

Mr. MANN: Objected to as incompetent, irrelevant and immaterial.

The COURT: Objection overruled.

Mr. MANN: Exception.

A. I mailed them to Father Di Palma, at Trinidad, Colorado.

Q. When was your attention first called to the fact that these papers were to be used upon the trial of the case?

Mr. MANN: I object to that as incompetent, irrelevant and leading, and cross-examination of his own witness.

The COURT: Objection overruled.

Mr. MANN: Exception.

A. Last December at the trial of the case.

Q. What, if anything, did you do to get back the papers at that time?

Mr. MANN: Same objection.

Q. When your attention was first called to it?

The COURT: Objection overruled.

Mr. MANN: Exception.

401 A. I immediately telephoned to Trinidad, Colorado, and after two days, succeeded in locating Father Di Palma, requested him to send them at once, and immediately put them into the safe of Mr. Wood's office.

Mr. MANN: I move to strike out the answer, as a self-serving declaration by the witness, and as incompetent, irrelevant and immaterial for any purpose.

The COURT: Objection overruled.

Mr. MANN: Exception.

Mr. WOOD: We offer this in evidence in connection with ledger, exhibit O, and as pages from ledger, exhibit O.

Thereupon, the papers referred to, being three loose leaves from ledger O-1, were marked plaintiffs' exhibit O-2.

The COURT: Did you ask how he came to send them to Father Di Palma, or for what purpose?

Mr. WOOD: I thought he stated: I will ask that now, specifically, as preliminary to offering them.

Q. For what purpose did you send those pages to Father Di Palma?

Mr. FIELD: Same objection.

The COURT: Objection overruled.

Mr. FIELD: Exception.

402 A. To show him what cash and medicines were charged to his account.

Mr. FIELD: I move to strike out that answer, because the account

on these pages is Jesuits and Jesuit Fathers, and not Father Di Palma. There is only one memorandum on this page apparently referring to Father Di Palma, so far as we have been able to discover from examining it, and that is one purporting to have been made two days before this transaction.

After argument.

The COURT: He said the purpose was to show what things had been charged to him.

Mr. WOOD: Yes.

The COURT: I will overrule the objection: of course, if the paper is contradictory to what he testified, that if another matter.

Mr. FIELD: We except.

Mr. WOOD: Now we offer these leaves in evidence with Ledger O, as pages from that ledger.

Mr. FIELD: We renew our objection.

The COURT: Objection overruled.

Mr. FIELD: Exception.

403 Q. You were asked in connection with the expense incurred by you in moving from the Weinman building to the Grant building, in repairing certain of your fixtures, after the fall of the wall, and at that time you did not have the bills for that amount. Have you since searched for the bills for those expenses?

A. Yes, sir.

Q. Are the bills which I show you, bills incurred by you in that connection?

A. (Witness examining a bundle of papers.) Some of them are.

Q. Can you now, after examining those bills, tell us and describe in detail, the expenses which were incurred by you in moving your stock to the Grant building?

Mr. MANN: Objected to as incompetent, irrelevant and immaterial.

Mr. FIELD: And no proper foundation has been laid to allow him to refresh his recollection.

The COURT: Objection overruled.

Mr. MANN: We except.

A. Yes, sir.

Q. Tell us, Mr. Ruppe—describe in detail the expenses that were so incurred by you in removing your stock.

Mr. MANN: I object, for the reason that no proper foundation has been laid for the use of these papers as a memorandum
404 with which to refresh his memory, and that evidence of this kind is not admissible under the pleadings, and does not tend to prove any issue in the case, and is incompetent, irrelevant and immaterial.

The COURT: Objection overruled.

Mr. MANN: We except.

The COURT: I think, Mr. Wood, that it must appear that these are the bills which were rendered to him for the things about which you inquired.

Mr. Wood: I thought that was asked the other day, but I am not quite sure that it appears fully that these are the bills which were rendered to him at the time.

Mr. Field: Of course our objection is based on the state of the evidence at the time the objection is made. I understand your Honor to overrule that objection, and that we have taken an exception. Now, if some further foundation is attempted to be laid, we would like leave to renew our objection.

The Court: Yes, of course. I am not quite sure that he said so.

Mr. Wood: It is my recollection that we went over them in part, when it came up before, and again when it came up at this time.

405 Q. Were you able at the present time, Mr. Ruppe, to recollect, without the aid of any memorandum the amounts of expenses incurred by you in moving your stock from the Weinman building to the Grant building?

Mr. Field: To which we object, on the ground that all this has been gone over once and the court has held that there was sufficient foundation laid for the use of these papers.

The Court: I feel quite sure he testified to that, but I do not feel quite sure that he testified to what he got in the shape of bills or from whom he got them. I will sustain the objection to that.

Mr. Wood: Upon the ground that it has been already testified to?

The Court: Yes.

Q. Mr. Ruppe, where did you get these bills which I have shown you, and which you have spoken concerning?

A. We got them from the individual parties to whom I paid the various sums specified on the bills.

Mr. Field: To which we object, and ask to have stricken out, as a construction of the bills and not an answer to the question.

The Court: Objection overruled.

406 Mr. Field: Exception.

Q. And were those items incurred and paid by you for expense in connection with that moving?

Mr. Field: Objected to as leading and suggestive.

The Court: The other question included repairs as well.

Mr. Wood: Yes.

Q. And repairs?

Mr. Field: Same objection.

The Court: Objection overruled.

Mr. Field: Exception.

A. Yes, sir.

Q. Now, Mr. Ruppe, describe in detail those expenses and tell us the amount of each.

Mr. Mann: I object, for the reason that no proper foundation has been laid, the witness himself testifying that only a portion of these bills are bills of the character suggested, and the ones that are

not such bills have not been designated; and further, that it is incompetent, irrelevant and immaterial and does not tend to prove any issue in this case.

The COURT: Objection overruled.

Mr. FIELD: Exception.

A. Marble slab for soda fountain, $30.60—Peltier Brothers.

407 The COURT: He didn't ask you who; I believe your question did not cover that.

Mr. WOOD: No, I asked him the amount and the nature.

A. Plumbing bill, $88.67; lumber, $8.36; carpenter work, $46.00; plate glass show case, $15.00; hauling, one bill, $2.50; two looking glasses—show cases—$3.00; one glass sponge case, $2.00; two glasses, $6.00.

Mr. MANN: I move to strike out all that testimony of the witness as irrelevant and immaterial, for the reason that no foundation has been laid for it.

The COURT: Objection overruled.

Mr. FIELD: Exception.

Q. Now, Mr. Ruppe, have you been able—what search have you made to find any other bills returned for the expenses incurred by you in connection with that moving and repairing?

Mr. MANN: I object to that as irrelevant and immaterial.

The COURT: Objection overruled.

Mr. MANN: Exception.

A. There is a bill of Trimble's——

Q. The question was, what search did you make for other bills than those which you have found.

408 A. I have looked for other bills and have been unable to find them.

Q. Where were those bills kept?

Mr. MANN: Same objection.

The COURT: Objection overruled.

Mr. MANN: Exception.

A. In the cash book in my desk.

Q. You say the bills were kept in the cash book in your desk?——

Mr. MANN: Same objection.

The COURT: Objection overruled.

Mr. MANN: Exception.

A. I refer to the bills of moving from the Weinman to the Grant building.

Q. Where did you find those that were produced here?

Mr. MANN: Same objection.

The COURT: Objection overruled.

Mr. MANN: —.

A. In my desk.

Q. Now, do you know of any other expenses incurred by you save those for which you have found bills of which you have testified?

Mr. MANN: Same objection.
409 The COURT: Objection overruled.
Mr. MANN: Exception.

A. Yes, sir.
Q. And what other expenses were incurred by you in that connection?

Mr. FIELD: Same objection.
The COURT: Objection overruled.
Mr. FIELD: Exception.

A. Help, watchman, Trimble's bill for hauling—that is all I at present remember.
Q. How much was Trimble's; what did you pay Trimble for hauling?

Mr. MANN: This is objected to, for the reason that the witness has already testified that he cannot swear to these things without something to refresh his memory; and it is leading and suggestive, incompetent, irrelevant and immaterial and not within the issues of the case.
The COURT: Objection overruled.
Mr. MANN: Exception.

A. I do not remember the amount without referring to my account.
Q. Now, did you make a memorandum of those items at or near the time that you incurred the expense?
410 Mr. MANN: Objected to as leading and suggestive and calling for a conclusion of the witness as to when he did it, time being very essential on the part of the witness to examine such writing if he made it.
Mr. WOOD: I will withdraw the question.

Q. Did you, at any time, make a memorandum of these expenses so incurred?
A. Yes, sir.
Q. When did you make it?

Mr. MANN: Objected to as leading and suggestive.
The COURT: Objection overruled.
Mr. MANN: Exception.

A. As soon as the bill was presented to me, which is generally on the first of the month.
Q. Now, do you recall the time about when it was, as near as you can recall, when you made the memorandum of these items that we are speaking of?

Mr. FIELD: We make the same objection, and object to it as cross-examination of his own witness.
The COURT: Objection overruled.
Mr. FIELD: Exception.

A. Whenever the bills were presented to me, I——

Q. Please tell us when: we don't know when the bills
411 were presented to you.

Mr. FIELD: He said, in answer to the former question, that it was about the first of the month.

The COURT: Which month, that is what Mr. Wood wants to know, I suppose; whether they were presented promptly or delayed does not appear yet.

A. About August 1st, 1902.
Q. Now, where did you make that memorandum?
A. In a book.
Q. What book?
A. That book that I had here at—that is lost.
Q. You still have not identified the book.

The COURT: He said it was a book which he had here which was lost. He has testified about that book and there was only one, I believe.

Mr. WOOD: Perhaps there was only one.

The COURT: I do not think he testified about more than one lost book.

Mr. WOOD: I do not know that we showed at this time just what efforts were made to find that book—at this trial I mean, and I will ask him about that.

The COURT: He said the last he saw of them was on the table there.

Q. What, if any, effort did you make to find that book,
412 since you left it here on the table, as you testified to?

Mr. MANN: I object that it is incompetent, irrelevant and immaterial, and cross-examination and leading.

The COURT: Objection overruled.

Mr. MANN: Exception.

A. I searched both of the vaults here in the court house—the one on this story and the one in the clerks' office, and failed to find there the book.

Q. Did anyone assist you in that search?

Mr. MANN: Objected to, for the same reason.

The COURT: Objection overruled.

Mr. MANN: Exception.

A. Mr. Owen and Mr. Venable.

Q. Mr. Owen, the court stenographer here, and Mr. Venable, the then clerk of this court?

A. Yes, sir.

Q. And were you able to find the book?

Mr. MANN: Same objection.

The COURT: Objection overruled.

Mr. FIELD: Exception.

A. No, sir.

Q. Have you ever seen it since you left it here on the table?

413 The COURT: He has testified to that.
Mr. WOOD: Withdrawn.

Q. Now, without going over that again, but to identify it, is that the same book that you formerly testified to from which you copied the items into the bill of particulars?

Mr. MANN: Same objection.
The COURT: Objection overruled.
Mr. MANN: Exception.

A. Yes, sir.
Q. And state whether or not they were correctly copied, if you know?

Mr. MANN: Same objection.
The COURT: Objection overruled.
Mr. MANN: Exception.

A. Yes, sir.
Q. Can you, by refreshing your recollection from the bill of particulars tell us what expenses were incurred by you in connection with the moving and repairing the damage done, other than what you have now already testified to?

Mr. MANN: Same objection.
The COURT: Objection overruled.
414 Mr. MANN: Exception.

A. Hauling, drayage,——
The COURT: Answer yes or no.
A. Yes, sir.
Q. Please do so.

Mr. MANN: We object to this as incompetent, immaterial and irrelevant, and no proper foundation has been laid and the same is not within the issues of the case.
The COURT: Objection overruled.
Mr. MANN. We except.

A. Hauling from the Weinman building into the grant building, $19.50; extra help, $6.00; help in searching the ruins on the second day, and moving, $16.75.
Q. Is that all, Mr. Ruppe?
A. Yes, sir.

The COURT: He testified something once about a watchman: if there is anything about that, it would be better in this connection than at any other place.
Mr. WOOD: I thought he went over that.
The COURT: I think he did cover it in some other form.

Q. Did you refer to a watchman employed, as part of the expense?

415 Mr. MANN: We object to that, on the grounds that there is nothing in the pleading——
The COURT: I suppose he can tell whether it is covered.

Q. Is the watchman included in what you have just testified to?

Mr. FIELD: Objected to as not competent, because if it is included, there is nothing in the pleading to justify such an expense. It is not within the issues.

The COURT: He can answer.

Mr. FIELD: We except.

A. Yes, sir.

Q. Mr. Ruppe, I think we did not fully cover the question of the checks—bank checks and check books, during the time that you were in the Armijo building; your present location—down to the expiration of this lease: state what has become of those checks and check books, if you know.

Mr. FIELD: Same objection that we made to this line of examination before, and the further objection that it is cross-examination of his own witness.

The COURT: Objection overruled.

Mr. FIELD: Exception.

A. I have not got them any more, and believe they have been thrown away with the rubbish and burned.

416 Q. Where did you keep them?

Mr. MANN: Same objection.

The COURT: Objection overruled.

Mr. MANN: We except.

A. At my house where I reside, in the rubbish room.

Q. And what have you done with that rubbish?

Mr. FIELD: Same objection.

The COURT: Overruled.

Mr. FIELD: Exception.

A. Some was burned—some was hauled away.

Q. When was this hauled away, subsequent to the expiration of this lease—or burned, if you know?

Mr. FIELD: Same objection: and the further objection that it assumes that it was hauled away subsequent to the expiration of this lease, and the witness has not said so.

The COURT: The objection is sustained on that ground.

Mr. WOOD: I will put my question in a different way.

Q. When did you send away or destroy the rubbish, as you have explained it, that was removed from the store to your house?

417 Mr. FIELD: Same objection.

The COURT: Objection overruled.

Mr. FIELD: Exception.

A. That happens every two or three months.

Q. Has it happened since the termination of this Weinman lease?

Mr. FIELD: Same objection.

The COURT: Objection overruled.

Mr. FIELD: Exception.

A. Yes, sir.
Q. How many times since then?

Mr. FIELD: Same objection.
The COURT: Objection overruled.
Mr. FIELD: Exception.

A. That is hard for me to say: whenever I have papers that are—become useless, I put them in a box and when the empty boxes are hauled to the house I generally manage to send the rubbish out with it.

Mr. MANN: I move to strike out this answer as not responsive to the question.

The COURT: Objection overruled.
418 Mr. MANN: Exception.

Q. Well, Mr. Ruppe, have you examined this book which you have offered in evidence, for the purpose of determining what, if any, bad debts were incurred by you because of merchandise sold during the period of the Weinman lease?

Mr. FIELD: To which we object, for the reason that it asks for a conclusion of the witness, and because it is leading and suggestive and assumes that he could, by examination of the books, tell how much bad debts he incurred: it calls for his construction of the books.
The COURT: Objection overruled.
Mr. FIELD: Exception.

A. Yes, sir.
Mr. WOOD: I will put my question in another way, which, however, your Honor ruled out at the former trial, upon their objection.
Q. Can you tell from memory, or your knowledge of that business without reference to the books, the amount of the bad debts or uncollectible accounts that were incurred by you during the period of the Weinman lease?

Mr. FIELD: We object, for the same reason, that it calls for a conclusion of the witness and his opinion as to what he can do, and not for a fact.
419 Mr. MANN: And because it is not the best evidence.
Mr. WOOD: If counsel will specify what he thinks is the best evidence, I will be enlightened.
The COURT: The Court did not rule upon this objection.
Mr. MANN: Exception.

A. Yes, sir.
Q. Now, how much are those uncollectible accounts incurred during that period?

Mr. MANN: Objected to as incompetent, irrelevant and immaterial and not the best evidence, and calling for secondary evidence.
The COURT: Objection overruled.
Mr. MANN: Exception.

Mr. FIELD: I wish to make objection on behalf of Defendant Barnett: I join in the objection of the Defendant Weinman and make the further objection that evidence as to the amount of bad debts incurred, without evidence as to the amount of purchases or sales of merchandise, is incompetent and merely tends to mislead the jury, and sheds no light upon the issues in this cause.

The COURT: Objections overruled.

Mr. FIELD: Exception.

A. Two hundred dollars.

420 Q. Mr. Ruppe, will you state whether or not the location to which you moved in the Grant building, and also the location to which you moved in the Armijo building later—for what purpose they were used prior to your moving into them?

Mr. MANN: Objected to as wholly immaterial. If they were not suitable places for him to go in, he had no business to go in there. We did not invite him to engage in business at an unsuitable place.

The COURT: It seems to me that is too remote.

Mr. WOOD: What I started to ask him was, whether those places were used prior, for drug store business, as bearing upon the suitability, by comparison of the places chosen, and anticipating the objection as leading, I asked him what they were used for.

The COURT: It still seems to me that would be too remote whether they had or had not been.

Mr. WOOD: I will put the question in another way, in answer to the remark of the Court.

Q. Had the locations in the Grant building and Armijo building been used before as a location for a drug store up to the time you moved into them?

Mr. FIELD: The same objection.

The COURT: Objection sustained.

421 Mr. WOOD: We except and offer to show by the witness, as bearing upon the relative merits of these places to the one from which he was evicted, for the purposes of a drug store, that they had not been so used before that purpose, and while they were the most suitable he could obtain, they were still not as suitable as the one from which he was evicted. We think that has a bearing upon the question.

Mr. FIELD: We say he can show they were not suitable at all——

The COURT: He asked him as to the drug business.

Mr. FIELD: We concede he may prove they were not suitable at all, if he desires to do so, so far as we are concerned.

Mr. WOOD: Like counsel, I shall have to rely upon the questions which I think bear on this point, and, as your Honor has ruled it out, I will content myself with an exception.

The COURT: Yes, I sustained the objection.

Q. Mr. Ruppe, did you take any inventories of your stock of goods while you were in the Weinman building, and before the fall of the wall?

Mr. MANN: Objected to as leading and suggestive.
The COURT: Objection overruled.
422 Mr. MANN: Exception.

A. Yes, sir.
Q. When did you take that: when did you finish that inventory?
A. In June, 1902.
Q. And where did you keep that inventory?
A. That inventory was in the same book that I referred to a little while ago.
Q. What book?
A. The book that I testified I had searched for and had been unable to find.
Q. And the one that you said was here at the two former trials—the first two trials?

Mr. MANN: Objected to as leading and suggestive and cross-examination of his own witness.
Mr. WOOD: I want to know clearly what he is referring to.
The COURT: Objection overruled.
Mr. MANN: Exception.

A. Yes, sir.
Q. Mr. Ruppe, from your experience as a merchant during the time in question, do you know what the conditions of trade in Albuquerque were for a year and a half subsequent to the fall of the wall?

Mr. FIELD: Objected to as not a proper subject for opinion evidence, and as leading and assumptive.
423 The COURT: Objection overruled.
Mr. FIELD: Exception.

The COURT: You may answer that yes or no.
A. Yes, sir.
Q. What was that condition?

Mr. FIELD: Same objection; and the further objection that no proper foundation has been laid for it, and the same is not within the issues of the case.
The COURT: Objection overruled.
Mr. FIELD: Exception.

A. It was good.
Q. How did it compare with the conditions of trade as they existed in Albuquerque during the time you were in the Weinman building?

Mr. FIELD: Same objection; and the further objection that it calls for a conclusion of the witness, and not for facts.
Mr. WOOD: We think there is no way in which the witness can show that comparison other than by letting him compare it, and that the comparative conditions of trade are an element in determining loss or profits.
Mr. FIELD: We do not wish to discuss the question.

Mr. Wood: It would be difficult for a man to answer it in
424 any other manner than by comparison.

The Court: I was not considering it in that way; but whether he should—he might answer in such a way perhaps, as to make the answer incompetent. I see no other way than to let him answer.

Mr. Field: We except.

A. Favorably.

Mr. Field: We move to strike out the answer because it is not responsive to the question, and is meaningless.

The Court: It may be stricken out, and the jury is so instructed.

Q. What do you mean by favorably?

Mr. Field: I do not understand that there is any question.

The answer of the witness was struck out.

The Court: I struck out the answer: that left the question. It may be repeated.

Thereupon, the next to the last question was repeated to the witness.

A. Conditions were getting better.

Mr. Field: We move to strike that answer out, as a conclusion of the witness and not a fact, and is incompetent as furnishing a standard by which the jury can measure the plaintiff's damages, for which purpose and no other it can be admissible.

425 The Court: Objection overruled.

Mr. Field: Exception.

Q. Mr. Ruppe, do you know—the dimensions of the adobes as they were in the building, in the wall?

A. Yes, sir.

Q. What were those dimensions?

A. Eight inches wide, sixteen inches long, four inches thick.

Q. Do you know the weight of adobes of those dimensions?

Mr. Mann: Objected to for the reason that no proper foundation has been laid. This witness, while he seems to be expert on everything else, has not yet been qualified on adobes.

The Court: A man need not be an expert to know what adobes weigh. He may answer.

Mr. Mann: Exception.

A. Yes, sir.

Q. Do you know the thickness of that wall, Mr. Ruppe?

A. Yes, sir.

Q. What was it?

A. One foot.

Q. What wall are you talking about?

Mr. Mann: Objected to as cross-examination of his own witness, and trying to dispute him, apparently.

426 A. What wall do you refer——

The Court: He can tell what wall he refers to.

Mr. FIELD: We except.

A. I refer to the wall that that adobe would make that I weigh-l.
Q. Now, nobody asked you anything about any adobe which you have weighed: what I want to know is, do you know how thick —
Mr. WOOD: It is my fault, I suppose, because I did not specify the building before.
Q. (cont.). Do you know how thick the adobe wall in the Weinman building was?
The COURT: The wall which fell?
Q. Which fell.
A. No, I do not.
Mr. WOOD: I think that is all. That is all I can now think of that I wish to show by this witness.

Cross-examination by Mr. MANN:

Q. Mr. Ruppe, you say that your check book stubs and your bank book, or checks—pass book—that you used during the time of this lease have all been destroyed, as I understand you?
A. At least I have not got them any more.
Q. Well, you testified, did you not, that they had been burned up and destroyed—hauled off with the rubbish?
A. I believe they have been destroyed with the rubbish.
427 Q. I will ask you first, Mr. Ruppe, what interest Richard Di Palma had in these goods that you claim were injured and destroyed?
A. We were partners together.
Q. And what was the name of the firm?
A. Cosmopolitan Pharmacy.
Q. Then these goods that were injured and destroyed belonged to the Cosmopolitan Pharmacy?
A. Yes, sir.
Q. And that was a partnership consisting of Richard Di Palma and yourself.
A. Yes, sir.
Q. Now, going back to these books—papers which you think were destroyed, burned; I will ask you whether or not they contained the stubs of the checks and the checks themselves that you gave during the period of this lease, or that the firm gave for payment of the goods purchased for the stock?
A. Yes, sir.
Q. Is that the only record that you kept, Mr. Ruppe, of the amount paid by the firm for goods purchased for the stock, during that period?
A. Together with the bill file, that is my record.
Q. And where is the bill file?
A. The file I have, but not the bills.
Q. Well, then, it was not really the bill file, but the bills that were evidence of these matters, is that not so?
A. Yes, sir.

428 Q. And what has become of the bills, Mr. Ruppe?

A. Whenever a bill was paid it was taken off the file, put together in a drawer, and when the drawer was full it was taken to the house generally.

Q. Put in with this rubbish that was destroyed by fire and hauled away?

A. Yes, sir.

Q. Now, you say that the expense of carrying on the business during that time was not all kept in these books that have been introduced in evidence?

A. Yes, sir.

Q. Where did you keep the expense, and how did you keep track of that expense?

A. I did not keep any separate expense account.

Q. Well, your are even able to testify now, from memory, what the expenses was, you say.

A. To the best of my memory, I am testifying to that, sir.

Q. You would, then, intend the jury to understand that that is absolutely correct?

A. I believe it to be as correct as I can possibly make it.

Q. Yes: as correct as you can remember, but you do not claim to remember all the items, Mr. Ruppe.

A. May possibly have overlooked something.

Q. How did you pay those expenses—in cash out of the drawer, or with checks, as a rule?

A. By checks and cash.

429 Q. And these books show only that part of the expense that was paid by cash out of the drawer, do they not?

A. Yes, sir.

Q. The other expenses were paid by check on your account in the bank?

A. Yes, sir.

Q. And these checks in the stub book, showing what these checks were given for, are the books or part of the books and papers that you have testified to as having been destroyed—hauled away?

A. Yes, sir.

Q. How does it come, Mr. Ruppe, that you preserved these bills that you have testified from this morning—those you have had laid on the judge's desk?

A. On Mr. Weinman's suggestion.

Q. He told you, did he, that you would better save all the bills?

A. Yes, sir.

Q. This is the first time you have ever produced them in court, is it not?

A. No, sir.

Q. When did you have them here before?

A. I had them with me at the other trial: this is the first time I have been asked for them.

Q. And is the first time you have produced them on the witness stand?

A. Yes, sir.

Q. You say that you made a memorandum of that at the time that the bills came in?

A. Collected them together and marked them down.

430 Q. Yes, but didn't you say that you made a memorandum of them—in a book, Mr. Ruppe, that is now lost, and from which your bill of particulars was made up?

A. I believe so, sir.

Q. You don't know where that book is?

A. No, sir.

Q. That book was not a part of this system of bookkeeping that you have used in your business, was it?

A. It was, just in the sense that it was a stock book.

Q. Well, what do you mean by a stock book: just explain that to the jury: I think I understand you, but they perhaps do not.

A. A stock book is a book in which the items are entered—upon taking an inventory.

Q. In other words, whenever you take an inventory of your stock of goods, to find out what you have on hand, that is entered in the stock book?

A. Yes, sir.

Q. But it is not a part of your system of bookkeeping proper, as to the business of the concern?

—. ——.

Q. What I mean is, in order to find out about how your business stood, it would be necessary to take the stock book, would it, in connection with the day book, the ledger and the cash book?

A. The stock book together with the cash book and the ledger.

Q. Would show what?

A. Would show the result of the year's business.

431 Q. And this book that you lost, or that was lost, then at the—at one of the trials of this case, was your regular stock book, was it?

A. It was a book that contained the last inventory.

Q. It contained just one inventory of the stock of goods that was in the Weinman building, along in May and June, it was made then, I believe you said?

A. I do not know how many it contained.

Q. How large a book was it?

A. A book similar to this. (Comparing with another book.)

Q. About the size of one of those day books?

A. Yes, sir, it was a day book used for that purpose.

Q. Is that the book that Dr. Baltes and Mr. Mallette and yourself used in getting out this inventory?

A. If they worked at the inventory they undoubtedly must have used it.

Q. Didn't you testify on your direct examination that they did assist you in the inventory?

A. At which inventory?

Q. At the inventory that you have just referred to, made in the Weinman building?

A. Yes, sir, I feel sure that Mr. Malette took that.

Q. But Dr. Baltes, do you think he took any part in that?

A. He may, and may not: he was doing night work at the time.

432 Q. You testified on the former trial of this case—the second trial of this case—did you not then testify that Mr. Baltes assisted in making that inventory?

A. I may have done so.

Q. Do you recall now, whether or not you did so testify at the second trial?

A. I have testified at so many trials it is impossible for me to state at what trial I testified to a material fact.

Q. What is your recollection at the present time as to whether or not Dr. Baltes did assist in taking that inventory?

A. At the May inventory Dr. Baltes was working at night time, and may have worked at the inventory.

Q. Well, so that you are rather inclined to think now that Dr. Baltes did not assist in making up that inventory?

A. I am not positive in stating either that he did or did not.

Q. Well, he did help to make up this list of things that were lost and destroyed, from which you made up your bill of particulars, did he not?

A. His information and knowledge assisted me in getting it up.

Q. Didn't you testify on your direct examination at this trial that that book contained a list of articles destroyed—that it was made up by Mr. Mallette, Dr. Baltes and yourself?

A. I testified that book contained——

Q. Just answer yes or no, please, then you may make your explanation.

433 A. I cannot answer it yes or no.

Q. Now it seems to me it is susceptible of such an answer: I said didn't you so testify: didn't you so testify?

A. I believe I did not.

Q. You believe you did not?

A. Yes, sir.

Q. Well, what did you say?

A. If I remember, I testified that I made up the list, and that, with the assistance of Mr. Baltes and Mr. Mallette, endeavored to gain knowledge of what was missing out of the stock.

Q. Now, in order to refresh your memory, I will ask you if, at the second trial of this case, which was in November, 1906, you were not asked the following question- and if you did not give the following answers: "We would like to have you produce that: now how did you arrive at the goods that you have included in this bill of particulars here, as being lost or destroyed? A. I took my bill; my invoice, and the inventory that had been taken, and rechecked—figured up the sales; then just simply to find out that we were right, and show what was missing, and got at it as I believe, as fairly as we possibly could, under the circumstances. Q. Did you make any minutes of the things which you bought? A. Yes. Q. You had a book here yesterday—this is not the same book is it? A. It is

the same book. Q. Where did you do that: do that figuring? A. (Referring to book) That was done by all three of us, immediately at the time of the wreck. Q. All three of whom? A. Dr.
434 Baltes, Mr. Mallette and myself." Did you not so testify?
A. Yes, sir.

Q. I will ask you if, at the time, you gave the testimony you have just testified to, Dr. Baltes was not out of town and out of the territory?

A. I believe so.

Q. Now, at the last trial of this case when you were asked about the inventory, did you not testify as follows: were you not asked, "Q. Didn't you say that the inventory was made by Mr. Baltes, Mallette and yourself? A. Yes, sir" Did you not so testify at the last trial?

A. The same as I have testified today.

Mr. FIELD: I ask to strike that answer out as not responsive.

Mr. MANN: I asked him if he didn't answer this question in a particular way at the last trial.

The COURT: The answer may be struck out.

A Yes, sir.

Q. I will ask you if these questions were not asked you and if you did not give these answers at the last trial: "Q. Now, I believe you say that this bill of particulars was made up from the invoices or inventory of your stock, taken about during the month of June, that is, just before the wall fell? A. I did not say exactly that. Q. What did you say about it? A. I said that the bill of particulars was made from a list that I put into a book, said list I made from the bills—inventory, and consultation with
435 the clerks. Q. Yes: and you did say, did you not, that you took an inventory of that stock and fixtures—everything that was in that drug store, and that that inventory was completed during the month of June? A. Yes, sir. Q. And did you not also say that your clerks, naming them, Mr. Baltes and another gentleman, assisted you in making this inventory? A. The clerks helped in making the inventory, yes, sir. Q. Did you not state that Mr. Baltes and another man whom you mentioned, Mallette, I believe—that you and Baltes and Mallette made this inventory? A. The inventory was made with the assistance of the clerks in the store. Q. And didn't you say that the inventory was made by Mr. Baltes, Mallette and yourself? A. Yes, sir." Did you not so answer, and were not those questions asked you and didn't you so answer on the last trial of this case?

A. I believe so, yes sir.

Q. And that was true, was it not?

A. I presume so, if it is in the record.

Q. You at least intended it that way?

A. Apparently I did not understand your question.

Q. I believe you said, Mr. Ruppe, that the amount of capital invested by the firm in this business, at the time you were in the Wein-

man building, including stock fixtures and everything, was between eleven and twelve thousand dollars?

A. Yes, sir.

Q. That is correct, is it not?

436 A. As I remember it, sir.

Q. And now you say that during the six and one-half months that you were in business there in that Weinman building, you sold, or at least took in, in cash from that business, $14,186.31?

A. Yes, sir.

Q. Of that eleven or twelve thousand dollars that was invested in the business, how much was contributed by Richard Di Palma and how much by yourself?

Mr. WOOD: I think I shall object to that as immaterial and not a proper question for cross-examination. I did ask the witness, and he testified that he and Father Di Palma were the owners of the business.

The COURT: Yes: and of course they have a right to verify that.

Mr. WOOD: Oh, yes; but does this question go to that If it does, then it is competent.

The COURT: I think it fairly goes to the question whether they were partners or not, and in that view of it I will permit it.

Mr. WOOD: What we proved was that they were the owners of the business, not in what particular they were partners or what their respective interests were. Unless it goes to the question whether they were the owners of the business, I do not think it is competent: if it does, I will concede it competent.

437 The COURT: I think on cross-examination this question fairly goes to that.

Mr. WOOD: But we object to the question for any other purpose than as cross-examination affecting the testimony of the witness, that he and Father Di Palma were owners of the property; and if offered for any other purpose, we object to it as incompetent, irrelevant and immaterial.

Mr FIELD: We ask it for any reason we think it is admissible.

The COURT: It perhaps also has a bearing upon the profits.

Mr. WOOD: The purpose of my objection is, that I do not want to be in the position of consenting that an irrelevant issue be dragged in.

The COURT: Objection overruled.

Mr. WOOD: We except.

A. I do not know what Father Di Palma's interest was at that time.

Q. You do not know what his interest was?

A. No, sir.

Q. Were you equal partners, or——

A. No, sir.

Q. Did you have any written articles of partnership?

A. No, sir.

Q. Did you have any writing whatever showing what the

438 interest of each of the partners *were* in this fund?

A. No, sir.

Q. And you didn't know at that time what his interest was in the firm; only that he was a member of the firm?
A. I do not know what his interest was at that time.
Q. But you did know, then, did you Mr. Ruppee, at that time?
A. Yes, sir.
Q. You have no memorandum by which you could refresh your recollection and recall what it was at that time, have you?
A. Yes, sir.
Q. Have you it here?
A. Yes, sir.
Q. I wish you would refer to it and tell us what his interest was and what your interest was at that time. Is this it?
A. Yes, sir. (Witness referring to Plaintiff's exhibit O-2) On June 28th, 1902, Father Di Palma's interest in the stock was $3,384.
Q. And how much was you interest, Mr. Ruppe?
A. The balance to make up between eleven and twelve thousand dollars.
Q. You cannot tell just whether $11,500 or just where it was between eleven and twelve thousand dollars?
A. No, sir, I can not.
Q. That included, of course, the stock, the fixtures, the electric piano, and everything that you had in there?
439 A. Yes, sir.
Q. Then as a matter of fact, in stock—just stock—about what did that amount to?
A. I cannot tell definitely what that did amount to.
Q. Well, the electric piano was $600?
A. Yes, sir.
Q. And what was the soda fountain?
A. I cannot remember.
Q. About what was it?
A. I believe it was $600.
Q. And the show cases—prescription case?
A. Show cases, $350.
Q. And shelving, counters?
A. I believe it was $400; I cannot remember it.
Q. Then the fixtures would approximate at least $2,000, would they not, Mr. Ruppe?
A. In that neighborhood.
Q. And that would leave the stock between nine and ten thousand dollars?
A. Yes, sir.
Q. And out of that nine or ten thousand dollars worth of stock, during that six months and a half, you sold, or there passed through your cash register this $14,185.31?
A. Yes, sir.
Q. And that does not include the soda fountain sales for one or two months, does it?
A. Yes, sir, whenever soda was sold it is on that schedule.

Q. Mr. Ruppe, I will ask you if it is not a fact that at the
440 time of the bringing of this suit, that Father Di Palma had no interest whatever in that stock of goods, other than that you owed him $3,350 on June 28th, 1902, and that he had other security for that?

Mr. Wood: If the Court please, I object to that as calling for the witness's conclusion, as not proper cross-examination and as incompetent and irrelevant under the issues formed by the pleadings in this case.

The Court: The question seemed to me to be double—that is about the other security.

Mr. Mann: I will withdraw the question.

Q. Is it not a fact, Mr. Ruppe, that the only interest that Father Di Palma had in this stock of goods at the time this suit was brought was that you owed him $3,500 and interest, and that he had security on this stock of goods, by way of a bill of sale or otherwise, therefor?

A. No, sir.

Q. I notice in this lease which was introduced here in evidence—I notice this release reads, the parties are Jacob A. Weinman, of Albuquerque, New Mexico, and R. Di Palma and B. Ruppe, manager; will you explain to the jury what that means?

A. Mr. Weinman wrote that lease out, or somebody for him.

Q. Well, you were a party to it, weren't you?

A. Yes, sir, and signed it as B. Ruppe.

441 Q. Well, why was it written in there as B. Ruppe, manager, if you know?

A. I do not know.

Q. As a matter of fact, then, you never signed the lease as manager?

Mr. Wood: I object to that upon the ground that the lease shows for itself as to how it was signed, and is in evidence.

The Court: Objection sustained.

Mr. Mann: This is referring to the paper marked Plaintiff's Exhibit B-B.

Q. Then, as a matter of fact, Mr. Ruppe, you signed it as a partner of Di Palma, did you?

A. As one of the owners of the store.

Q. And not as manager of——

A. I signed it as a partner, and not as manager.

Q. Is it not a fact that this property was returned—while out of this stock of goods, between nine and ten thousand dollars of stock——

The Court: Have you got the figures correct?

Mr. Mann: Yes, I think so, I have taken out the fixtures.

Q. The gross profits of these six months and a half are $5,674.52?

A. If these figures are correct it is—it was: that is, if you are reading them correct.

Q. I will let you read them.

A. (Witness examining memorandum.) Thank you.

442 Q. Now, tell the jury what your gross profits were for those six and a half months in the Weinman building, on that stock of goods of between nine and ten thousand dollars.

A. The gross profits were $5,674.52.

Q. Now, Mr. Ruppe, as I understand you, you can take this original bill of particulars and by looking at it, refresh your memory so that when you testify about these articles you are not testifying from the bill of particulars, but from your memory, is that correct?

A. Yes, sir.

Q. In other words, when you look at the bill of particulars and see that it says three-fourths of a dozen of Prickly Ash Bitters, six dollars, you can remember those bottles of Prickly Ash Bitters and their price, can you?

A. Yes, sir.

Q. And that is true also, of these other articles that you have testified to from this bill of particulars?

A. Yes, sir.

Q. And now when you get down to this place where there was—one-fifth of a dozen bottles of something, did it refresh your memory somewhat this time about that one-fifth of a dozen—this time as you read it one-sixth of a dozen.

A. As it was printed, yes, sir.

Q. What is the answer?

Mr. MANN: I move to strike the answer out, as it was printed. He was not asked how it was printed: he has asked how he

443 read it to the jury.

Mr. WOOD: We submit the answer is a fair reply to the question. The witness said nothing whatever this time about one-fifth of a dozen.

The COURT: When: at this time?

Mr. FIELD: We agree he did not: that is just what this question is. He said he read it as it is written. He is not asked how it is written.

Mr. WOOD: If counsel wants to strike out the statement, I read it as it is written, we do not object.

The COURT: It may be struck out.

A. Give me the question.

The COURT: He has not answered the question.

Thereupon, the last two questions and answers were read to the witness, by the direction of the Court.

Q. Do you remember at the last trial that you used this same memorandum at the last trial, you did, did you not, Mr. Ruppe?

A. Yes, sir.

Q. Do you remember that you did read it at the last trial, one-fifth of a dozen of Frazier's Bitters?

A. Yes, sir, I think so.

Q. So that it did not refresh your recollection correctly at that time, did it?

A. No, as I was a good deal worried at that time, those things
444 passed from my mind.

Q. It takes more to refresh your memory when you are worried than when you are feeling just right?

A. Yes, sir.

Q. Well, now, if you remember another place in the bill of particulars at the last trial, where you read, one dozen envelopes, one dollar and forty cents, something like that—you remember that?

A. Yes, sir.

Q. And this time when you got to that place you said, one lot of envelopes, one dollar and forty cents.

A. Yes, sir, refreshed my memory and thought that was what it would be.

Q. Being somewhat distressed the other time, it refreshed your memory wrong and you remembered only twelve envelopes?

Mr. FIELD: One dozen.

A. At the last trial I had sickness in my family, that worried me considerably.

Q. So much so that you could not remember about those particular articles when you came to them, I suppose?

A. It is the only way I can account for it.

Q. Now, your attention was not called to that by reason of the fact that the cross-examination drew out the absurdity of the proposition, was it?

Mr. WOOD: I object to that question as improper in form, and not proper cross-examination.

445 The COURT: Objection overruled.

A. When my particular attention was called to the items, I know by experience that I never had any envelopes that cost that much money in my possession.

Q. In other words, you knew the list was wrong, didn't you?

A. The list was wrong as regards to the typewriting.

Q. And you knew there could not be such a thing as one-fifth of a dozen Prickly Ash Bitters, when you thought of it?

A. Yes, sir.

Q. And is not that evidence to your mind that this does not recall these things to you at all, and that it does not refresh your memory as to those articles?

A. It does refresh my memory. I could not remember all that—that many articles without that memorandum.

Q. But when you look at this and see, for instance, one-fifth dozen Frazier's Bitters, why that recalls those articles to your mind and you remember the other articles, don't you?

Mr. WOOD: We object to that, upon the ground that counsel is, either intentionally or inadvertently misunderstanding him and misunderstands the record.

Mr. MANN: I am intentionally saying one-fifth.

446 Mr. WOOD: There is no such a thing on the paper.

After discussion and an inspection of the paper by the Court:

Q. What I want to know is, whether it calls to your mind the other articles that you are testifying about: is that the fact?

A. Yes, sir.

Q. And when you read it off of there you can actually remember it?

A. Yes, sir.

Q. For instance, when you read off of there so many bottles of Hostetter's Bitters, you do not rely upon the paper any more, but that calls up to your mind those bottles of Hostetter's Bitters?

A. Yes, sir.

Q. What became of the memorandum you had here at the last trial of the case, with reference to the injured stuff?

A. I do not know: it may be here somewhere, I have not got it.

Q. And you have not used that memorandum at this trial, have you?

A. I have not been asked to use it.

Q. You do not need it this time, do you?

Mr. WOOD: I object to that as immaterial.

The COURT: Objection overruled.

Mr. WOOD: It does not appear what memorandum he is talking about.

447 The COURT: He may answer.

A. Yes, sir, I need it.

Q. But you don't know where it is?

A. No, sir.

Q. Have you made any search for it, Mr. Ruppe?

A. No, sir.

Q. Now, about that book that you said a little while ago was the size of one of those day books: it is not a fact that that book which was lost was a book like this one?

A. That is a day book.

Q. Is not that your cash book?

A. Yes, sir, but I also use that style book for day books.

Mr. FIELD: This is plaintiffs' exhibit L we are talking about.

Q. You don't mean to say that this book is like the one you pointed to up here?

A. About the size, I said, of this one here.

Q. But as a matter of fact, it was the same size as this cash book which has been introduced in evidence as exhibit L, was it not?

A. Yes, sir.

The hour of 12 noon having arrived, a recess was here taken until 1 o'clock P. M.

Q. Mr. Ruppe, I will ask you if, at the last trial of this case, you were not asked the following questions and if you did not give the following answers: "Q. Now, I notice in this lease that has been

introduced in evidence between Mr. Weinman and Di Palma
445 and yourself, that you signed that lease as manager. A. Yes, sir. Q. Will you explain to the jury what your connection was with that business at that time? A. I am owner and manager—part owner and manager of the business. Q. I am speaking of the time that lease was signed. A. Yes, sir. Q. The lease as signed, purports to have been signed on the last day of November, 1901, and is signed by Jacob A. Weinman, R. Di Palma and B. Ruppe, manager: what was your connection with the business at that time? A. Owner and manager. Q. You were then the owner and manager of the store, at that time, together with Father Di Palma? A. Yes, sir. Q. What was the style of the firm? A. Cosmopolitan Pharmacy." Were you not asked those questions and did you not answer as I have read?

A. Yes, sir.

Q. And that was true, was it?

A. Yes, sir, with the exception of the——

Mr. Wood: I do not think it is a proper question to ask the witness, under these circumstances, is that true. He reads a long list of questions which are identically the questions and identically the answers which he has given today.

Mr. Mann: I will leave it for the jury to say whether there is any difference.

Mr. Wood: I think unless he shows a difference there is no basis for the question.

449 The Court: Objection overruled, if that is the objection.

A. (Cont.) With the exception of referring to my having signed it as manager. It shows me now, by looking at the lease that I did not sign it as manager, and when I testified the last time I thought I had used the term manager.

Q. As a matter of fact, the copy used at the last trial of the case was signed B. Ruppe, manager, was it not?

A. That I do not know.

Q. Look at this copy—this is exhibit——

Mr. Field: That is not marked as an exhibit.

Q. I will ask you to look at that and state if that is not the copy which was used at the last trial of the case. (Referring to papers attached to papers marked clippings.

Mr. Wood: I object to that as asking the witness to characterize the paper which is shown him, and a paper which is not in evidence at this time, and which at the best, purports to be a printed copy of some original used previously, and that original of the paper is now here and in evidence.

The Court: That is the lease?

Mr. Wood: Yes.

The Court: You introduced this yourself, did you not?

Mr. Wood: Originally I did, and with the consent of the court withdrew the copy and offered instead, the original. The
450 original is now in evidence here and referred to as plaintiff's exhibit B-B.

The COURT: I suppose it appears that there were two copies of the lease—if it is of importance.

Mr. WOOD: I think I will withdraw the objection.

A. I do not know, sir.

Q. You say you do not know whether that is the one or not?

A. Yes sir, I do not know.

Q. You saw the copies that were used at that time, did you not?

A. I do not remember of the lease ever having been shown to me during the trial, until this trial.

Q. I will ask you, Mr. Ruppe, now with reference to this five hundred dollars' worth of stuff that you have testified to as having been injured and not destroyed: can you state to the jury what the items were of that?

A. I can state some of them.

Q. As a matter of fact, at the last trial of this case didn't you have a memorandum which you made during the progress of that trial, from which you testified as to some of those articles?

A. Yes, sir.

Q. Have you that memorandum with you?

A. No, sir.

Q. Have you seen it since the last trial?

A. No, sir.

Q. Can you now recall the articles that were contained in that memorandum?

A. I can some of them.

451 Q. State as many as you can recall.

A. There were hair brushes——

Q. How many hair brushes?

A. The quantity I could not state—tooth brushes.

Q. Can you state how many tooth brushes?

A. No, sir;—nail brushes——

Q. Can you state how many nail brushes?

A. No, sir.

Q. Very well, proceed.

A. Military sets.

Q. How many military sets?

A. Three.

Q. What was the value of the three military sets?

A. I do not remember that.

Q. Well, what else?

A. There were some abdominal belts.

Q. Do you remember how many and what the damage was to the abdominal belts?

A. No, sir.

The COURT: Do you mean the kind of damage or the amount of damage?

Mr. MANN: The amount.

A. No, sir.

Q. Now, anything else?

A. Shoulder braces.

Q. Do you know how many shoulder braces?

A. No, sir.
Q. Nor how much the damage was to them?
A. No, sir.
452 Q. Now, what else?
A. Boxes of stationery.
Q. Do you remember how much boxed stationery?
A. No, sir.
Q. And what the estimated damage was to the boxed stationery?
A. No, sir.
Q. Do you remember any other articles that were damaged that you have not mentioned?
A. Looking glasses.
Q. How many looking glasses?
A. I do not remember.
Q. Do you remember what the estimated damage to those looking glasses was?
A. No, sir.
Q. Do you remember any other articles?
A. Some patent medicines, Swayne's Panacea.
Q. Do you remember how many patent medicines there were, how many bottles and what they were?
A. No, sir: Hostetter's Bitters, Paine's Celery Compound, Radway's Ready Relief——
Q. Do you remember how many bottles of each?
A. No, sir.
Q. Don't you remember that there were three of those bottles of Radway's Ready Relief?
A. I do not, sir.
Q. Well, was there any more patent articles?
A. Yes, sir.
Q. You don't remember how many nor how much they
453 were damaged?
A. No, sir.
Q. Now, didn't you have a list of all those articles here at the last trial and didn't you testify at that time that you prepared that list after the case was called for trial, from memory?
A. Yes, sir.
Q. But you have not done that at this trial?
A. No, sir, I have not been required to do so.
Q. And you cannot remember those articles now, as to their amount, quantities and prices?
A. No, sir.
Q. Then, as a matter of fact, when you place the estimate at $500 damage you are just simply making a guess at it, are you not?
A. Not when I made the estimate.
Q. You knew what it was then, did you?
A. Yes, sir.
Q. And you knew what every one of the articles was?
A. Yes, sir.
Q. But you cannot tell the jury what they were?

A. I can tell what they consisted of, but not each individual article.

Q. That is, you can give the class of article, but not the number in each class?

A. Yes, sir.

Q. Nor can you give the value of the articles themselves?

A. No, sir.

Q. All that you know now is, that at that time you estimated them at $500?

454 A. Yes, sir.

Mr. MANN: That is all.

Cross-examination by Mr. FIELD, on behalf of Defendant Barnett:

Q. Now, Mr. Ruppe, when did this partnership between Richard Di Palma and B. Ruppe, under the firm name Cosmopolitan Pharmacy Company begin?

A. I believe in 1893 or 1894, I am not positive.

Q. When did it end?

A. It has not ended.

Q. It still goes on?

A. Yes, sir.

Q. When did you last have a settlement of the partnership accounts of that firm?

A. Last February.

Q. Was that settlement in writing?——

A. Not of this year—the last year, February of last year.

Q. Was that settlement in writing?

A. Nothing more except the writing that is on those sheets there referred to as exhibit O-2, and what correspondence passed between Father Di Palma and myself.

Q. Did you have a settlement of the accounts of the partnership in February, 1909, which was reduced to writing—figures in dollars and cents?

Mr. WOOD: We object to that as immaterial and not proper cross-examination. It is something long subsequent to the injury and long subsequent to the commencement of this suit.

455 The COURT: I thought he just answered what he did have—unless these leaves might contain something.

Mr. FIELD: I have not asked for the contents of any writing.

The COURT: Do you mean to show how they stood at that time?

Mr. FIELD: The question will indicate what I mean.

The COURT: Objection overruled.

Mr. WOOD: We except.

A. Yes, sir.

Q. Have you that writing?

A. I believe so.

Q. Where is it?

A. I believe it is in my desk.

Q. Will you produce it here?

Mr. Wood: I object to that as irrelevant and immaterial.

The Court: I think it bears upon the question whether they were really associated. Objection overruled.

A. Yes, sir, if I can find it.

Q. At the time that this partnership was formed was there any writing setting forth the relation of the partners to each other?

A. No, sir.

Q. At any time during the existence of the partnership
456 was there any writing which set forth the relation of the partners to each other?

A. No, sir.

Q. And never was?

A. No, sir.

Q. At the time the partnership was formed how much capital was embarked in the business?

A. Between five and six thousand dollars.

Q. Who contributed the capital?

A. Father Di Palma put in $2,000.00 and I owned the balance.

Q. Did you put what you put in, in money?

A. I had the stock—accumulated stock—fixtures, and such things as that.

Q. Answer my question: did you contribute a dollar of money to the partnership firm of Cosmopolitan Pharmacy, at the time it was formed, if so, how much?

A. I had no money except what was in the store.

Q. That is not an answer to my question.

The Court: By in the store, do you mean in the cash drawer or books, or do you mean invested?

A. Invested in the store every cent I had.

The Court: I suppose that amounts to an answer that he had none to put in.

Mr. Field: I want an answer and not an inference.

The Court: Answer the question directly then, whether you put in any money at the outset.

457 A. No, sir.

Q. Have you produced here any book showing the accounts prior to the time when this settlement of the 28th of June, 1902, was entered on that book?

A. No, sir.

Q. Have you any such book in your possession?

A. Not that I know of.

Q. Well, did you ever at any time, have a book in which you kept the accounts of the partnership from 1893 until 1902?

A. I never had a partnership book.

Q. These books which you have produced here are not the books of the partnership, are they?

A. Yes, sir.

Q. Why, I thought you said you never had a partnership book?

A. Not in which the partnership business is specially set forth.

Q. There never was, at any time, any book kept in which the

accounts of B. Ruppe and Richard Di Palma as members of this partnership, were shown?

A. Except as they appear in the ledger there.

Q. Well, that ledger does not purport to go back to 1893, does it?

A. No, sir.

Q. Now, is it not a fact, Mr. Ruppe, that the only interest that Father Di Palma ever had in this business was that he loaned you money and upon which you agreed to pay interest at the rate of eight per cent per annum and repay at the rate of one
458 hundred dollars per month, and that he had a bill of sale of the stock, by way of security, for that loan?

A. No, sir.

Q. I will ask you if, on the last trial of this case, you were not asked this question: "Q. Is it not a fact, Mr. Ruppe, that Mr. Di Palma's interest in that business, at that time, was as a lender of money to you, and that he held a bill of sale for a security of the money he lent?" And did you not answer "Yes, sir." and did not, as to the time referred to in that question, it mean the time when the lease was signed?

A. I may have answered that question that way.

Q. You say now, however, that it is not true that his interest there was only as a lender of money.

Mr. Wood: He didn't say that the interest was only as a lender of money.

The Court: Overruled.

A. Yes, sir.

Q. Is it not a fact, Mr. Ruppe, that Father Di Palma never had any personal interest in this business of any character, and that whatever interest he had was as a representative and agent of The Jesuit Society of New Mexico?

A. That I do not definitely know.

Q. You do not definitely know? Do you know it indefinitely?

459 Mr. Wood: I object to what he knows indefinitely, it is immaterial.

The Court: Objection sustained.

Mr. Field: Exception.

Q. Is it not a fact that when Father Di Palma removed from Albuquerque, that all of the interest in this business which he theretofore represented was turned over to Father Capulipi, as a successor in the Jesuit order, and is it not a fact that all of your transactions with reference to this business since he left here have been with Father Capulipi, as such successor?

Mr. Wood: I object to that as irrelevant, incompetent and immaterial and not proper cross-examination and not within the issues framed in the pleadings in this case.

The Court: Objection overruled.

Mr. Wood: Exception.

A. No, sir.

Q. Have you any transactions with Father Capulipi with reference

to this business which are independent of the original arrangements which you made with Father Di Palma about it?

A. No, sir.

Q. When did you last pay to Father Di Palma any sum of money on account of this business?

A. On the order of Father *of* Di Palma they were paid to Father Capulipi and Father Gentile.

460 Q. When did you last pay to Father Di Palma any money on account of this business?

A. The last time we had a settlement—1902.

Q. The last time you paid Father Di Palma any money at all on account of this business was in 1902 prior to the fall of this wall, is that true?

A. Yes, sir.

Q. Is it not also true that all of the business in connection with this—with your drug store—has since that time been conducted by the representative of The Jesuit Fathers in Albuquerque, either Father Capulipi or Father Gentile?

A. No, sir.

Q. Have you ever paid any money to Father Capulipi on account of this business?

A. Yes, sir.

Q. When?

A. I do not remember the dates.

Q. Have you no account of that money?

A. I did have an account of it.

Q. What did you do with it?

A. Sent it to Father Di Palma last year.

Q. At the same time you sent him these papers?

A. Yes, sir.

Q. He didn't send it back to you?

A. He sent me just what I asked for.

Q. He didn't send that paper back to you?

A. Not that I know of.

Q. Do you know when you paid Father Di Palma any money on account of this business?

A. I cannot remember.

Q. You have no idea?

A. No, sir.

461 Q. Do you know how much it was you paid him?

A. Not by memory.

Q. Now, you say that this business has been going on from 1898 to this time and that you have not paid Father Di Palma any money on account of this business since 1902: and you cannot tell when you ever paid Father Capulipi and Father Gentile any money on account of this business?

A. That leaf will show some of the payments that was made to Father Capulipi or Gentile.

Q. Will you kindly point out on this leaf which of the payments were made to Father Capulipi or Father Gentile? (Handing to witness plaintiffs' exhibit O-2).

A. There was one thousand dollars——

Q. I just asked you to point out—point out the entry which says money paid to Father Capulipi or Father Gentile.

A. In July $100; August $100 (witness pointing out).

Q. What year?

A. 1902: September $100; October $100; November $100; December $100; January $100; February $100;—$100 paid partly in July, and January 6th, 1904, $100.

Q. All of the payments which you have read on page 213, beginning July, 1902, and being $100 each, were made either to Father Capulipi or Father Gentile?

A. Yes, sir, I had a bank book there in which I deposited that money to their credit.

462 Mr. FIELD: I ask to strike out the bankbook: I did not ask him anything about the bankbook.

The COURT: That may be stricken out.

Q. Now, I want to know which of those payments of $100, *which* you have made to Father Capulipi and which to Father Gentile.

A. I cannot separate them; I do not know which I paid to Capulipi and which I paid to Gentile.

Q. Have you paid a dollar to either one of them since the date—1904, on account of this business?

A. Not that I remember of.

Q. Nor a dollar to Father Di Palma?

A. No, sir.

Q. Mr. Ruppe, the stock of merchandise which was in that store was returned for taxation for the year 1902, by Father Di Palma in his own name, was it not?

Mr. WOOD: I object to that as incompetent and immaterial and as not proper cross-examination and not the best evidence.

The COURT: Objection sustained.

Mr. FIELD: Exception.

Q. Did you return the property—the stock of merchandise in that store for taxation for the year 1902?

A. No, sir.

Q. Do you know who did?

463 A. Yes, sir.

Q. Who did?

A. Father Di Palma.

Q. Who paid the taxes?

A. The store.

Q. The store?

A. Yes, sir.

Q. By whose hand?

A. Mine.

Q. I will ask you to look at this schedule for 1902 in the name of Richard Di Palma and state whether or not it is the schedule which was used on the last trial of this cause.

A. They had a schedule here but I do not know whether this is the one.

Q. You never saw the original schedule used here, did you, on the second trial?

Mr. Wood: We do not care to spend time about this. We make no contention but that those are copies of the papers that were here on the last trial.

Q. Now, is it not a fact that you have recently protested to Father Capulipi against his giving any information to the defendants in this case as to his relations with you?

A. I have not protested to Father Capulipi.

Q. You have not told him that you objected to his giving us any information?

A. I did not object to his giving any information.

Q. And you have not said so to him?

A. I inquired from him whether he had given any in-

464 formation.

Q. When was that?

A. Was in the store one day and I spoke to him.

Q. Can you remember the time?

A. No, sir.

Q. Didn't you at that time and place ask him not to give to me or to Mr. La Driere any information about your business relations with him?

A. No, sir.

Mr. Wood: We object to that.

The Court: Objection overruled.

Mr. Wood: Exception.

A. No, sir.

Q. Now, is it not a fact, Mr. Ruppe, that there was a writing between you and Father Di Palma with reference to this transaction and in connection with this drug business, and that writing is now in existence and in the possession of Father Capulipi.

Mr. Wood: We object to that as asking this witness to testify as to possession of papers in the possession of some one other than himself, something he cannot possibly know about; and because it is not proper cross-examination, is irrelevant and immaterial and not within any issue framed by the pleadings.

The Court: Objection overruled.

465 Mr. Wood: We except.

A. There was a writing between Father Di Palma and myself, but not a partnership agreement which you asked me about.

Q. Where is that writing?

A. I do not know: I have not got one.

Q. Did you ever have any business with Father Di Palma of any nature except that connected with his drug store business?

A. No, sir.

Q. Now, is it not a fact, Mr. Ruppe, that the paper held by

Father Capulipi as evidence of your indebtedness to The Jesuit Society at this time, is the original paper executed by you to Father Di Palma, and the only paper ever in existence showing your business relations with Father Di Palma touching this drug business?

Mr. WOOD: We object to that as incompetent, irrelevant and immaterial, and as calling for the witness to put a legal construction upon some unknown instrument which he has not seen, and as calling for him to identify its possession.

The COURT: Objection overruled.

Mr. WOOD: We except.

A. I do not know what the paper that Father Di Palma has is.

Q. You did not keep any copy of the paper which you executed to Father Di Palma?

A. I had one.

Q. What did you do with it?

466 A. It is lost.

Q. Do you remember what it contained?

A. No, sir.

Q. You have no recollection whatever about what was in that paper?

A. It was abrogated by Father Di Palma and myself immediately upon the execution of the same, and I paid no further attention to it.

Q. Then if Father Capulipi has any such paper, it was abrogated before he got it?

A. Yes, sir.

Q. When was this paper executed with reference to the year 1893?

Mr. WOOD: I would ask, in order that I may be in a position of raising a question, that the counsel specify what paper he is talking about. The indefinite paper Father Capulipi has, or the paper that this witness testified he executed for Father Di Palma, there is no evidence that they are the same.

Mr. FIELD: If the witness has any such difficulty we will try to make it clear for him. I can have no reference to any paper except the one he said he executed, as to which I asked him when, with reference to the year 1893.

The COURT: I do not think you did specify whether this refers to the Capulipi paper or to the other, if there is another.

Q. When was that paper which you say was abrogated immediately after it was made, executed? In what year?

467 A. Possibly 1893 or '94, I do not remember—1893——

Q. Have you made any search for that paper, Mr. Ruppe?

A. Yes, sir.

Q. Where did you look for it and when?

A. I looked in amongst all my papers in the desk and in the box where I carry my life insurance policies, at the house.

Q. When?

A. I think it was immediately after the last trial.

Q. Did you ever make any application to Father Capulipi or Father Di Palma for their copy of that paper or a copy of that paper?

A. No, sir.

Q. What was your purpose in looking for a copy among these papers?

A. I was borrowing money from the bank and Mr. Strickler wanted to know what authority I had for borrowing further money beside what Father Di Palma had authorized me to borrow.

Q. You wanted to get this paper to show Mr. Strickler that you had authority to borrow further money?

A. No, sir.

Q. Well, for what?

A. He asked for it.

Q. Well, what did he know about it?

A. When Father Di Palma went to Mr. Strickler together with me and told Mr. Strickler to loan me up to one thousand dollars—

Mr. Strickler then said if there was any writing in—between
468 Father Di Palma and myself, and I showed him that paper and later on he asked me for it again and I could not find it—that is what made me look for it.

Q. That was only last year—just before the last trial that you made this search to show it to Mr. Strickler?

A. Yes, sir, he wanted to see it.

Q. This paper which was abrogated in 1893 or '94, immediately after it was executed?

A. I told Mr. Strickler so.

Q. But you looked for the paper immediately before the last trial to show to Mr. Strickler that you had authority to borrow more money; the paper which you say, on your oath, was abrogated in 1893 or '94, immediately after it was made.

A. No, sir.

Q. Well, what did you say about it? What were you looking for it for?

A. He wanted to see it and I looked for it to show it to him.

Q. He wanted to see a paper which had been abrogated in 1893 or '94?

A. Yes, sir.

Q. And you told him it had been abrogated in 1893 or '94 and he said he wanted to see it?

A. Yes, sir.

Q. And you could not find it?

A. No, sir.

Q. Now, Mr. Ruppe, have you produced here all the books that you have and memoranda touching this business from 1893 up to the present time?

A. No, sir.

469 Q. What other books have you that you have not produced?

A. I have cash book, day books—ledger.

Q. Covering what period of time?

A. I do not know which ones I have there—which period they cover.

Q. Are they part of this same system of books?

Yes, sir.
Is it not a fact that a great many of the accounts on this ledger
been carried to a new ledger?
Yes, sir.
And that new ledger you have not produced?
No, sir.
Is there, in the books which you have produced or in any
you have not produced, any entry or entries from which a
keeper could ascertain what was the total amount of merchan-
bought for the purpose of this business during the life of the
man lease?
No, sir.
Are there, in these books any entries from which a bookkeeper
ascertain the amount paid out in the conduct of this business
g the period mentioned, for any of the following items—rent?
No, sir.
Clerk hire?
Partially.
Why do you say partially? Did you keep an account of your
hire expenses?
A. Part were paid in cash and part by check.
Q. Now, did you understand the question I asked you?
A. Possible not.
The question, Mr. Ruppe, is whether or not a bookkeeper could
these books and find entries there showing items about which I
king you.
No, sir.
Light?
No, sir.
Fuel?
No, sir.
Interest?
No, sir.
Taxes?
No, sir.
Insurance?
No, sir.
Advertising?
No, sir.
Or any extraordinary expense that might have been incurred
e business?
No, sir.
You have testified here that your expenses for the two years
ou occupied the Weinman building and the period running on
g the life of this lease—your expenses were $434 for each and
month, have you not?
Yes, sir.
You mean this jury to understand that your expenses never
l, but you always had $434 of expenses every month, no more or
s?

A. They varied, but I estimated that amount—to the
471 best of my belief.

Q. That is no more than an estimate, your belief as to what your expenses would average, is it, Mr. Ruppe?

A. I remembered the salaries I paid and naturally approximated it—in looking over my books—what the expenses were.

Mr. FIELD: I ask that the answer be stricken out and the witness be instructed to answer the question.

Mr. WOOD: I submit the question is a fair answer.

The COURT: Objection overruled.

Mr. FIELD: Exception.

Q. Is it not true that this statement is simply an estimate made by you of the average monthly expenses of conducting your business during the life of this lease?

A. Yes, sir.

Q. Are there any entries in these books which you have produced or in any other books in your possession, from which a bookkeeper could ascertain the percentage of profit realized by you on the sale of merchandise in that business?

A. Yes, I think he could.

Q. How could he do it?

A. By taking the sales and bank deposits.

Q. The bank deposits are not contained in any of these books, are they?

A. No, sir.

Q. Well, then, he could not ascertain the bank deposits
472 from these books, could he?

A. He could get a copy from the bank, I presume.

Q. Now, do you understand the question I am asking you, Mr. Ruppe? I will repeat it for you: Are there, in these books that you have produced or in any other books in your possession kept by you, from which a bookkeeper, after any amount of time spent thereon, could ascertain the percentage of profit which you received in the conduct of that business?

Mr. WOOD: I object to that on the ground that it calls for the witness's conclusion as to what a bookkeeper can do.

The COURT: Objection overruled.

A. No, sir.

Q. You destroyed your pass books, check books and checks?

A. They were destroyed.

Q. You destroyed them, didn't you?

A. Not that I remember of personally, having destroyed them all.

Q. They were destroyed under your direction, were they not?

A. As usual, not needing them any more, I told my wife to have them burned up.

Q. The important fact I am after is, that they were destroyed under your direction: is that a fact?

A. Yes, sir.

Q. You destroyed all your invoices in the same way?
473 A. Yes, sir.
Q. You have not produced here on this trial or on any former occasion, any book or books which would enable the defendants, through a bookkeeper or otherwise, to test the accuracy of your estimate that you received forty per cent profit in that business, have you?
A. I have not produced them because I was not required to do so.

Mr. FIELD: I ask to strike out the answer, because I was not required to do so.

The COURT: It might just as well remain in there: I will overrule the objection.

Mr. FIELD: Exception.

Q. You could do so, if required?
A. I could of then made an effort to save everything if I thought it had been necessary.
Q. And if you had saved everything that you had in your possession at the time that this wall feli, a competent bookkeeper could have taken the data which you then had and have arrived at the facts about the percentage of profits, could he not?
A. Yes, sir.
Q. Now, I will ask you, Mr. Ruppe, about the merchandise which you said, on your direct examination, was injured, and was worth $800: was that the value of the merchandise after it was injured or before?
474 A. Before it was injured.
Q. Was that the wholesale or the retail value?
A. That was the retail value.
Q. Can you tell this jury what that merchandise had cost you?
A. All those goods, I would consider them as having cost me $400.
Q. I ask you if you did not testify on the second trial of this case, that the wholesale cost of those goods was $174.80, or approximately that sum?
A. No, sir.
Q. You are sure of that, are you?
A. I believe so.
Q. You testified, on the former trial, that the damage to those goods was $500, did you not—I mean on the trial which took place in 1906.
A. I believe so.
Q. And on the last trial you testified that the loss on the goods that cost you $400 was $500, didn't you?
A. That I do not remember.
Q. You also testified, did you not, Mr. Ruppe, that you sold those goods that cost you $400 for $300.
A. I testified that I believed I had received $300 for the goods.
Q. I will ask you, Mr. Ruppe, if, on the former trial, you didn't give the following testimony: "Q. Now, we ask you to refresh your recollection from that memorandum and state to us as many of the

articles as were there as you can, and give their value as it
475 was before they were injured," to which you answered, "Three dozen suspensory bandages $4.50; half dozen of the same $2.00; one-half dozen of the same $3.00," then the question, "Before going further let me ask you what value you are giving." A. "I am giving the wholesale price. Q. That is what I want—go on," then you enumerated a great number of articles which I will show you if you wish to see, and you wound up by saying, "That is all I can remember," and then you were asked this question, "What is the total value of those?" to which you answered "Which amounts to $174.85." Do you want to look at this?

A. Yes, I want to see it. (Witness examining transcript.) Yes, sir.

Q. Now, on the trial of this case which took place in 1906, I will ask you if you did not testify as follows: "Was not the damage to the goods just as much loss as the destruction of them—the impairment of the values of the goods, if you had to hawk them off at bargain sales? A. That is the reason I put $500 in as presumable damage on them." Were you not asked that question and did you not give that answer?

A. I do not remember.

Q. Weren't you also asked this question: "Didn't you have to say, Well, this article is damaged so much—and arrive at the number of articles of the same kind; these cigarettes damaged so much, and this and the other thing so much, and estimate the damage as you went along, and put down some figures to see what that amounted to—in the first place, to find out what the original
476 value of the goods was; did you have to do that?" and did you not answer: "We didn't, for the simple reason that what is itemized it not included in the claim of $500—we took that stuff that we had—that was estimated—soiled—that could possibly not be sold at its market value and made a rough guess at it, an estimate, the same as any man would do on a bargain." Did you so testify?

A. I do not remember.

Q. Now, I will ask you, if on the former trial of this case, you were not asked the following question: "What was the fair, reasonable, wholesale value of those articles that you have specifically enumerated, after refreshing your recollection, in their damaged condition, as you saw them? A. $174.85." Did you so testify?

Mr. Wood: If the Court please, I object to asking the witness about his testimony upon the former trial save in instances where it contradicts or purports to contradict testimony which he has given upon this trial, and this question does not contradict or tend to contradict any testimony which he has given on this trial.

The Court: I do not suppose they would take the trouble to put it in unless they supposed it will contradict something.

Mr. Field: I supposed that was the business of the jury. I do not suppose that it made any difference whether your
477 Honor might think this contradicts any evidence on the former trial or not.

Mr. WOOD: I should assume that if counsel put questions identically the same and the witness answered identically the same as on the former trial, I should assume that it was not for the purpose of contradiction.

Mr. FIELD: Of course we think they are contradictory or we would not be asking these questions.

The COURT: I supposed so.

After argument.

The COURT: I will overrule the objection.

Mr. WOOD: We except.

Q. I will ask you if you did not testify as follows, right after the last question which I read to you: "Those articles, as here listed, are worth——. A. Retail, approximately $400." Did you not so testify on the former trial?

A. I do not remember.

Q. Then were you not asked this question and did you not——

Mr. FIELD: That answer appears to have been stricken out.

Q. And then did you not answer that same question—"The wholesale value is $174.85," and then were you not asked this question, "Damaged or undamaged?" and did you not answer, "Undamaged." Now, were you not then asked this question "Now
478 give me the wholesale value of the damaged condition that they were in when you went over them. A. About $120 or so." Did you not give that testimony in the former trial of this case?

A. I do not remember.

Q. Your memory is not as good as it was on the former trial of this case, is it?

A. I think it is better.

Q. You think it is better: Well, during the former trial of this case, at the instance of your counsel, you went off and sat down and thought about the matter and made up a list of these damaged goods, produced it here and used it as a part of your testimony, did you not?

A. Yes, sir.

Q. Now you cannot remember what testimony you gave about that list which you made up under those circumstances.

A. With reference to the list, I remember it distinctly.

Q. But you don't remember what you said on the trial with reference to the value of the goods in that list?

A. The question was so complex that I could not answer it.

Q. Which question was so complex that you could not answer it?

A. The one you asked me.

Q. Now?

A. No, the one before that—the long one when you read my testimony.

Q. Now, let me understand you, Mr. Ruppe, you cannot remember
479 what your testimony on the former trial of this case was, because you do not understand my questions: they are too complex?

A. Sometimes I do and sometimes I don't.

Q. Now, let us see whether you understand this question: now, were you not asked by your own counsel, on the former trial of this case: "Did you, from going over those goods, in the way you have suggested, then determine the wholesale value of those goods that were upon the table?" and did you not answer, "Yes, sir." Were you not then asked this question——

The COURT: Mr. Field, would it not be better to take those by sections? You get so many together that it is confusing, and that is what I understand the witness complains of.

Mr. FIELD: I will give him them one at a time.

Q. "Did you, from going over those goods, in the way you have suggested, then determine the wholesale value of those goods that were upon the table? A. Yes, sir. Q. And can you now state what the wholesale value of all those goods was before they were injured. A. I can. Q. Will you give us that value? A. To the best of my recollection it was $400." Did you or did you not so testify on the former trial af this case—the last trial?

A. I think I did.

Q Now, were you not then asked these questions and did you not give the answers I will read: Q. "What did you, at that
480 time, determine were the values of the articles of the other, in the condition in which they were?" which you answer, "The damaged value of the articles——

Mr. FIELD: That is not right, there seems to have been no question and an objection intervenes then and the question went on:

Q. (Cont.) "Q. the damaged value of the articles? which you answer "I did." Were you not then asked this question, "And what, in your judgment, were those articles worth in their damaged condition?" and did you not answer "Three hundred dollars?"

Mr. WOOD: Now, if the Court please, I wish to repeat my objection because this question so fairly illustrates the objection I made before. That is identically and clearly the testimony he has given upon this trial now, and he is being asked if he did not give the same testimony before. It is word for word as he testified upon this trial.

Mr. FIELD: I wish I might be permitted to examine the witness without having his attention called by counsel to what the questions are—I am propounding. I am reading parts of the testimony at the former trial which I think are contradictory with the testimony given now.

The COURT: I suppose the difference cannot be determined by this part of it perhaps; you can go on. Had you finished your question?

481 Mr. FIELD: He has not answered it.

The COURT: Whether you so testified.

Mr. WOOD: Does your Honor overrule my objection.

The COURT: Yes.

Mr. WOOD: We except.

A. Yes.

Q. Were you not asked this question: "What was the fair and reasonable wholesale value of these articles you have specifically enumerated, after refreshing your recollection, in the damaged condition in which you saw them?"—did you not answer "$174.85?"

A. If I did I made a mistake.

Q. Well, did you or did you not? That is what I want to know now.

A. I do not know whether I did or not.

Q. Well, is that because the questions are so complex that you can not understand them, or is it because of a failing memory?

A. My answer to that undoubtedly indicates that I referred to the list as made out here by me.

Mr. FIELD: I move to strike that out as not responsive to my question.

The COURT: Overruled.

Mr. FIELD: Exception.

482 Q. Now, did you not at the same time, testify as follows: "The wholesale value is $174.85." Q. "Damaged or undamaged? A. Undamaged." Did you not so testify on that occasion?

A. I do not remember.

Q. Why? Because the question is too complex, or because your memory fails you?

A. Because undoubtedly, the same as I said before, I must have had on my mind in answering that question that list that I prepared.

Mr. FIELD: I ask to strike the answer out as not responsive.

The COURT: Overruled.

Mr. FIELD: Exception.

Q. You don't remember whether you gave any such answer or not, but if you did give any such answer, manifestly it was because you had reference to the list?

A. Yes, sir.

Q. Well, now, do you remember whether or not you did give any such answer.

A. Very likely I did, if it is in the record.

Q. No, but I am talking about your recollection now: do you remember whether you gave any such answer?

A. No.

Q. Do you know, if you did give any such answer, what it referred to?

A. Yes, sir.

Q. What did it refer to?

483 A. It referred to that list of goods that I had made out.

Q. And the wholesale value of the list of goods you made up, in their undamaged condition was $174.85, was it?

A. That is all that I could give by memory at that time.

Q. I am asking you if you did not testify also, that the wholesale value was $400 at that same time.

A. Yes, sir.

Q. Well, what were you referring to then?
A. To the lot of damaged goods.
Q. That is, the goods contained in the list which you made were worth $174.85 and in addition to those that were contained in the list there were enough other goods damaged to make the wholesale value $400, and that is your testimony now, is it?
A. Yes, sir.
Q. Now, is it not true that you never attempted at any time until the last trial of this case, to do anything more than to make a rough guess at the extent of the injury to these goods, and did you not so testify on the trial of this case which took place in 1906?

Mr. WOOD: I object to that as not proper cross-examination, not fair, as double, misleading and complex.
The COURT: Objection overruled.

A. No, sir.
Q. I am asking you if, on that trial, you did not testify as follows:

484 The COURT: Which trial?
Mr. FIELD: The trial of 1906.

Q. Weren't you asked this question: "Didn't you have to say, Well, this article is damaged so much—and arrive at the number of articles of the same kind; these cigarettes damaged so much, and this and the other thing so much, and estimate the damage as you went along, and put down some figures to see what that amounted to—in the first place to find out what the original value of the goods was: did you have to do that?" and didn't you answer, "We didn't, for the simple reason that what is itemized is not included in the claim of $500: we took that stuff that we had—that was estimated—soiled—that could possibly not be sold at its market value, and made a rough guess at it—an estimate, the same as any man would do on a bargain." Didn't you so testify?

Mr. WOOD: We object to that on the ground that counsel has read that precise question and answer once before and asked the witness the precise question and witness answered it.
The COURT: I do not think he made that precise answer this time.
Mr. WOOD: But the counsel has read the question and answer from the record: this is at least the second time counsel has
485 read that same question and answer.
Mr. FIELD: That is true, sir: I did ask him this—it is about that examination that the witness said the question was so complex.
The COURT: I believe I asked you to cut it up into sections, I will overrule the objection.

A. I do not remember.
Q. Why: is this question so complex that you cannot understand it, or is it failing memory?
A. I do not remember the whole question.
Q. Can you not refresh your recollection by looking at the record?
A. I could.

Q. Please do so. (Counsel handing transcript of testimony to witness.)

A. Yes, sir, I believe that must have been my answer.

Q. You have had no means of enlarging your knowledge on this subject—increasing your knowledge of the value of the goods since that answer was given, have you?

A. Nothing but my daily handling of the same and handling of those goods.

Q. Have you handled any of those goods since that trial?

A. Not those identical goods, but goods similar to them.

Q. I ask you, Mr. Ruppe, whether you have any means of increasing your knowledge as to the value of those particular goods since you gave that answer at the trial in November or De-
486 cember, 1906?

A. No, sir.

Q. You know Eugene Baltes, do you not?

A. Yes, sir.

Q. You testified upon that trial that Eugene Baltes assisted you in making an inventory of the goods that were lost, did you not?

A. Yes, sir.

Q. You also testified that Eugene Baltes assisted you in making the estimate of damage on these injured goods, did you not?

A. That I do not remember.

Q. I will have to ask you if you can not refresh your recollection again: I will ask you if, on the occasion to which I have referred you were not asked this question, "In making that estimate by Mallette, Baltes and yourself, did you have to look at the goods?" and did you not answer that "We had them before us."

A. Yes, sir.

Q. Did you not also—were you not also asked this question, "just as much necessary to make an inventory of those goods destroyed and estimating item by item the impairment of the value as there was to make a list of the goods that were actually totally destroyed," and did you not answer, "In estimating that, Mr. Mallette, Dr. Baltes and myself estimated it—when it came to the cigars and cigarettes I called in Mr. Fleischer, or Mr. Rosenthal—I forget now which it was, but the book will show." Now, did you so testify on that occasion?

A. I believe I did.

487 Q. State whether or not all of the figures in this book between the pages 38 and 89 are in your hand writing. If there is a figure in that book between those pages not in your handwriting, point it out and tell us whose handwriting it is. I refer to the cash book marked plaintiff's exhibit L.

A. All the entries appear to be in my writing.

Q. Was this book kept in your store in the regular course of business, during all of the time with which it purports to deal, save from 6-1900 to June, 1908?

A. Yes, sir.

Q. How many clerks did you have during the period of the life of the Weinman lease from December, 1901, to December, 1903?

A. Six.

Q. Name them.

A. Baltes, Mallette, William Burgess, Lily Burgess and one clerk whose name I have forgotten, that worked before Baltes came there.

Q. Were the entries made by you——

A. I had some others but I am trying to think of them. I had some new man when I went into the Armijo building, and there were others, but I cannot remember their names.

Q. Were all of the entries made in this book by you between December 1901 and December 1903, made on the dates when they purport to have been made?

A. They may have been made the day following; sometimes two days may have elapsed before they were made; if I was out of
488 town, possibly longer.

Q. Well, now, you said that the way you made up these entries, if I remember correctly—and if I am wrong I want you to correct me—that you counted the cash, took up the entry on the soda water book and the entries in the cash register, and from those three things you made up these daily entries: is that so?

A. We have a slip in the cash register.

Q. Yes.

A. Yes, sir.

Q. What do you mean by a slip in the cash register: is that a slip which is punched by the register itself?

A. That is a slip on which the items that are taken out of the cash account are put on.

Q. That was a loose memorandum not connected with the cash register.

A. Yes, sir.

Q. Kept by whom?

A. Every clerk would mark there what he took out of the drawer.

Q. Now you were sometimes out of town as much as a week at a time, weren't you?

A. Yes, sir.

Q. Now, how could you get the items for the daily entry on that book when you were out of town as much as a week at a time?

A. The register would show the total amount of sales. The clerk that closed the store would mark them on that slip—the slips was added and when I would come back I would take the slips and enter
them in the book here.

489 Q. And all you knew about it was—the marks that were on those slips and what the clerks told you?

A. Yes, sir, I see that the cash balances.

Q. Well, how did you make the daily entries in that book when you were out of town for as much as a week at a time and make them show what you say they show?

Q. Because the daily transactions were on that slip of paper.

Q. All of those entries which you made when you were out of town were made from the slip.

A. Made at all times, whether I was in town or out of town.

Q. Made at all times, whether you were in town or out of town?

A. Yes, sir.
Q. From a slip kept by the clerks?
A. A slip that lays right in the cash register.
Q. That is what I understand, it is a loose slip that fits in the drawer of the cash register, on which the clerks made entries?
A. Yes, sir.
Q. And all the knowledge that you have about the entries that you put in that book you derived from that slip kept by these clerks?
A. Yes, sir.

Mr. WOOD: He didn't mean that.
The COURT: Perhaps he didn't catch that. He said that it balanced the cash.
490 Mr. FIELD: He has answered it and I object to this remark by counsel and the Court.
The COURT: He said that a question or so back and I thought perhaps he spoke so low that you did not hear him.
Mr. FIELD: I heard him, and I want an exception.

Q. Now, Mr. Ruppe, will you tell this jury how it happened that in that book there is a blank space at pages 72 and 73 and a space of two pages between April and May, 1903: tell the jury how it happened that you didn't make any entry on those pages.
A. That happened by simply turning over one page too many and starting on the opposite side.
Q. When did you first observe that you had turned over a page too many and started on the opposite side?
A. I noticed it here the last time, when we had the book here in court.
Q. That is the very first time you ever did noticed it?
A. The first time I ever noticed it.
Q. Also, Mr. Ruppe, tell the jury how it happens that—well in the first place, the original entry in ink, on page 124 of this book was written "June 1908," was it not?
A. It appears that way, sir.
Q. Well, can you say whether or not that is true?
A. It looks as though it is my ink.
Q. Do you know whether or not you wrote that "June
491 1908?"
A. Yes, sir.
Q. Well, did you?
A. It looks that way, sir.
Q. If that book was kept in your store in the ordinary course of business day by day and month by month, can you tell the jury how it happens that in starting the entry for the month of June 1905 you wrote it originally 1908?
A. That, sir, is unexplainable.
Q. You simply cannot explain that circumstance and do not undertake to do it?
A. No, sir.
Q. You remember to have written a 5, in pencil, over that 8 at some time, do you know when you did that?

A. No, sir; it appears to have been done when the figuring was done.

Q. And when was the figuring done, if you know?

A. Undoubtedly at the end of the month when I figured up the account.

Q. Do you have any recollection of that fact?

A. No, sir.

Q. Or is that a mere inference of yours?

A. Yes, sir.

Q. Mr. Ruppe, who fixed the values which are placed in the bill of particulars opposite the itemized articles there?

A. I did.

Q. Were they wholesale or retail values?

A. Wholesale.

Q. How was it that in your testimony in reference to the damaged goods you gave us the retail value, and in your testi-
492 mony as to the destroyed goods you gave us the wholesale value?

Mr. Wood: If the Court please, is that argument? Does that call for any fact save speculation?

The Court: Overruled.

A. The goods in the bill of particulars were completely destroyed—the goods for which the claim of $500 damage—were not completely destroyed.

Q. So when the goods were completely destroyed you put them in at wholesale value and when not completely destroyed, you put them at retail?

A. I put in the profits that I lost on them—as damaged.

Q. Well, didn't you lose the profits on the goods that were destroyed just the same as you did on the others? What is the difference?

A. Yes, sir.

Q. There was not any difference, was there?

A. The ones that were completely destroyed we could not sell any more.

Q. And so you didn't charge anything for that?

A. No, sir.

Q. Now, the goods that you did sell, as I understand you now, your testimony is, that the wholesale value of those goods was $400.

A. Yes, sir.

Q. And the retail value of them was $800?

A. Yes, sir.

Q. And you know that now: that is no guess or estimate,
493 but is a matter of your personal knowledge?

A. That is my best belief.

Q. Well, I am not asking for your belief; I am asking for your knowledge.

A. To the best of my knowledge.

Q. Have you any knowledge on the subject?

A. I believe so.

Q. Have you more knowledge than you had when you testified in 1906?

A. I understand your questions better, very likely—better than I did before.

Q. You understand the questions better now than you did in 1906?

A. Some of them.

Q. And it is the form in which the questions are put to you now that makes you able to testify, as a matter of personal knowledge what you said in 1906 was a rough guess, is that right?

Mr. WOOD: I object to Mr. Field summing up the case twice.

The COURT: Objection overruled.

A. The word "rough guess" has been habitually used by me and apparently means different with you than it does with me.

Q. Rough guess, with you means accurate knowledge, does it?

A. Pretty near it.

Q. It means nearly accurate knowledge?

A. Yes, sir.

494 Q. And when you used that expression in 1906, you used it to convey to the minds of the jury pretty nearly accurate knowledge of the amount of damage?

A. Yes, sir.

Q. Now did you not testify on the former trial of this case—in the last trial of this case as follows, with reference to this cash book: "Did you have a clerk during this time——" I may be mistaken about this, Mr. Ruppe, but you can examine the record if you want to see whether I am,—during this time, to which this question refers was the time covered by the cash book and the book referred to was the cash book, as I now understand it—we cannot take time to look it up, but if you have any doubt about it I want you to look it up. "Q. Did you have a clerk during this time, Mr. Ruppe? A. A prescription clerk, yes, sir. Q. Where is he? A. One is here and the other one is in California, I have learned. Q. Did either of those clerks have anything to do with keeping this book? A. No, sir." Did you so testify?

A. I believe so.

Q. Did you not at the same time—were you not at the same time asked this question and did you not answer as I read: "Q. Did he have anything to do with determining the amount of the cash sales each day. A. No, sir." Did you so testify?

A. I believe so.

Q. When did you first make a list of articles which you claimed were totally destroyed by that accident?

495 A. I made a list at the time we separated them from the stock.

Q. Well, those articles I am asking you about were separated from the stock by destruction, were they not; how long were you engaged in making that list?

A. All during the month of July.

Q. Didn't you, on the former trial, of this case, testify that the cash register was locked and that you kept the keys?

A. I may have so testified.

Q. Didn't you also testify that when you went out of town nobody could get into the cash register until you came back?

A. I believe on leaving town I always left the key behind.

Q. I am asking you now if you didn't so testify on the last trial?

A. I do not remember.

Q. Now, what is the fact, did you take the key of the cash register with you when you went out of town, or not?

A. I do not remember.

Q. You don't remember whether you took it with you or whether you left it with somebody?

A. I do not remember: I have one little lock fixed in the cash register and I have sometimes left it in there under special lock.

Q. You don't remember whether you said on the last trial that when you left town you left the cash register locked and that nobody could get into it while you were gone?

A. I do not remember.

Q. You say you were engaged during all the month of
496 July in making up the list of articles that were destroyed?

A. Yes, sir.

Q. Well, did you finish it in July?

A. I do not positively remember when I finished it.

Q. Well, I want to know as near as you can tell us, Mr. Ruppe, when did you finish that list?

A. I do not remember.

Q. You do not know whether it was July or August or September?

A. No, sir.

Q. Now, do you know whether it was at any time before the order for the bill of particulars was made in this case.

A. I am not positive that it was.

Q. Is it not a fact that you continued to put things on that list from time to time up to the very time of the order for the bill of particulars?

A. I kept adding to the list, but as regarding to being up to the time of the order of the bill of particulars, that I do not remember.

Q. Did you say who assisted you in making up that list?

A. Yes.

Q. Who was it?

A. I stated that I inquired from Mr. Mallette and Dr. Baltes about goods that I missed and that I called their assistance in helping me get up that list.

Q. Now, is it not a fact that for months after you got into the Grant building, so called, whenever your attention was called
497 to any stock that you didn't have and that you thought you had in the Weinman building, that you put that on the list as having been destroyed?

A. No, sir.

Q. Well, you did put on the list the things that you missed, didn't you?

A. Yes, sir.

Q. Whenever you missed them?

A. If I was satisfied, after inquiry, that they had been in stock at the time of the wreck.

Q. That is, if it was the recollection of Dr. Baltes or of Mr. Mallette that you had such a thing in the stock in the Weinman building and you didn't have it in the Grant building, then you put it down on this list as having been destroyed?

A. And the bills showed it had been purchased racently—and nobody remembered selling it, then I would put it down.

Q. Well, now, let us see if this is right: in the first place, you would have to have a bill of the recent purchase of the stuff?

A. Yes, sir.

Q. In the next place you had to be unable to find it in stock?

A. Yes, sir.

Q. And in the next place you had to have the recollection of either Baltes or Mallette that you had had it in stock in the Weinman building?

A. Or myself.

Q. And in the next place you would have to have the recollection of, or the want of recollection on the part of, Baltes, Mallette or yourself as to its having been sold to anybody, in the Grant
498 building?

A. Yes, sir.

Q. And when those things concurred you put on your list anything that you thought was destroyed?

A. When I felt satisfied it should be in stock, and it was lost, after inquiry, I would put it on the list.

Q. And that for a period of months after you got into the Weinman building?

A. That I cannot state—how long it was.

Q. You cannot state that it was not so?

A. I know it kept up during the month of July, possibly part of August.

Q. I will ask you if, in the former trial of this case—the last trial, you didn't testify as follows: "Was there anything done at the end of the day to verify the correctness of the amounts punched by the cash register? A. Yes, sir. Q. In what way was it done. A. By counting the cash in the register. Q. Now, what record or memorandum did you make of the cash so ascertained? A. By putting the amount in the book—cash book. Q. Now, at what particular time were these entries made? A. Whenever I check up the cash register. Q. And how often is that? A. If I was in town it would be every day. Q. And when you were out of town——? A. The cash register was locked and nobody could open it except myself. Q. And then what was done, upon your return, if anything? A. Then I would count the cash and open the slide and see the
499 total amount of cash punched up and put it in the book." Did you so testify on the former trial?

A. I may so have testified.
Q. Well, did you or did you not?
A. I do not remember it.
Q. Can you refresh your recollection by examining the transcript of your testimony?
A. If it is there, I must have so testified.
Q. Look and see whether it is there. (Handing copy of transcript to the witness).

Mr. WOOD: This is not a record made by the witness; how can he refresh his recollection from that?
Mr. MANN: He said he could.

A. I have.

Mr. FIELD: So far as I know, I am through with this line of cross-examination, and I desire to commence on an entirely different subject, the fall of the wall.
Mr. WOOD: I would like to clear up something about the locked cash register at this time before adjournment, if Mr. Field is willing.
Mr. FIELD: I may wish to ask some further questions about this same line I have been asking about, if I have an opportunity to run over the testimony.
The COURT: I will allow you to do that.

Q. When was the wall on the east, which stood to the east of the wall of the building occupied by you, taken down?
500 A. I believe it was in the month of May.
Q. Do you know what time in the month of May?
A. I do not remember, sir.
Q. You do not remember?
A. When it was in May?—when in May, it was——
Q. When did excavation—After the wall which stood to the east of your wall was taken down was the foundation of that wall left for some time or not?
A. I think it was, sir.
Q. Do you know when that foundation was removed, Mr. Ruppe?
A. No, sir.
Q. Have you any idea how long it was removed before the wall fell?
A. No, sir.
Q. You don't know whether it was a week or a month?
A. No, sir, I have no recollection of it.
Q. There was a foundation under that wall, was there not?
A. Yes, sir.
Q. You saw it there?
A. Yes, sir.
Q. Before it was taken away?
A. Yes, sir.
Q. And afterwards you saw the ground with the foundation removed?
A. Yes, sir.

Q. Now, do you know whether or not at that time excava-
501 tion had been commenced on lot number one—any part of it?
A. No, sir, I do not.
Q. Do you know when the excavation did commence on lot number one?
A. I think in the month of June.
Q. What time in the month of June?
A. I believe in the first week.
Q. How long had excavation been going on on lot number one at the time this wall fell?
A. If my surmise of the first week is correct, it must have been three weeks.
Q. Well, is this just a surmise; have you no recollection on the subject?
A. I remember distinctly the excavations but I do not know when they were commenced.
Q. You do not know when you first had knowledge of the excavating being commenced?
A. Nothing more than except seeing the men digging there when passing by.
Q. You did see them there at work on that excavation for days or weeks before the wall fell, didn't you?
A. Yes, sir.
Q. When, if at all, did you receive notice or knowledge of the existence of the party wall agreement?
A. Mr. Weinman told me——
The COURT: He asked when——
A. I am coming to that—I believe in the month of June.
Q. You say you believe in the month of June?
A. Yes.
502 Q. Before or after the excavation was commenced on lot number one?
A. While the excavating was going on.
Q. You remember now that the excavation was commenced before you knew of the existence of the party wall agreement?
A. That is my belief, sir.
Q. Well, this is a matter of recollection: now, have you any recollection on the subject?
A. That is my best recollection?
Q. You saw the party wall agreement?
A. No, sir.
Q. Well, you were told of its contents?
A. I was told they were going to build a wall there.
Q. Who told you?
A. Mr. Weinman.
Q. Didn't he offer to show you the agreement?
A. Not that I remember of, sir.
Q. Didn't he have the paper there at the time he was talking to you about it?
A. I do not know what he had.

Q. Didn't he explain to you what was going to be done and how it was going to be done?

A. No, sir.

Q. Didn't he tell you that they were going to dig under your wall and put a footing in there and put up a straight brick wall which would straighten the wall in your store?

Mr. WOOD: We object to that on the ground that it is not proper cross-examination. We did not go into that with this witness.

503 The COURT: Objection sustained.

Mr. FIELD: Exception. I offer to show by the witness that Mr. Weinman did explain to him what was to be done under the party wall agreement, and did explain to him that the result of it would be to straighten the wall of the building occupied by him, and we except to the refusal of the Court to permit us to do so.

Q. Mr. Ruppe, the wall of the building occupied by you was not straight, was it?

A. No, sir.

Q. In what direction and to what extent was it out of plumb?

A. I do not know to what extent, but it leaned slightly to the west.

The COURT: I think we would better stop here. It is after five o'clock.

And now the hour of 5:20 having arrived, the court adjourned until tomorrow morning, April 5th, 1910, at 9:30 A. M.

And now, at 9:30 A. M., April 5th, 1910, pursuant to adjournment, the trial of this cause proceeds.

Mr. RUPPE resumed the stand for further cross-examination by Mr. Field:

Q. Was there a decided bulge in the wall about three feet above the foundation?

Mr. WOOD: We object to that as not proper cross-examination, and as part of the affirmative defense, if admissible at all.

504 Mr. FIELD: This witness testified about the condition of the wall and excavation and what he saw of the fall of the wall, on direct examination.

The COURT: I will overrule the objection.

A. I cannot answer the question the way it is put to me.

The COURT: You know what the question is?

A. Yes, sir.

Q. Don't you understand the question?

A. Yes, sir.

Q. Well, why can not you answer it?

A. Because you asked me whether there was a decided bulge—there was a bulge, but not what I would consider a decided bulge.

Q. Well just describe that bulge to the jury, as near as you can.

A. Two or three feet from the foundation up there was a curvature in the wall: How big it was I cannot tell—I never measured it, but I could observe it in looking along the wall.

Q. Could you see it from the inside of the building, or from the outside, or both?

A. I saw it from the outside.

Q. You could not see it from the inside?

A. No, sir.

Q. Was not that wall so far out of plumb, Mr. Ruppe, that the clock hanging on it would not run?

Mr. WOOD: We object to that as calling for a conclusion
505 of the witness, as speculative and not proper cross-examination.

The COURT: Objection overruled.

A. I do not know of any clock ever being hung on that wall.

Q. If any clock was ever hung on that wall by Mr. Vann, you don't know it?

A. If Mr. Vann ever hung a clock on that wall, I do not know it.

Q. Now, you described on your direct examination, the construction of that building; I wish to ask you how long that building was?

A. Between ninety and one hundred feet, I am not sure.

Q. Of what material were the side walls?

A. Of adobe.

Q. And the rear wall?

A. I do not remember whether that was partly brick or not—I do not remember distinctly the rear wall.

Q. Do you remember what the front of the building was constructed of?

A. Wood and plate glass.

Q. The building had a tin roof, had it?

A. Yes, sir.

Q. And that roof rested on joists twelve inches wide?

A. That is my recollection.

Q. And it also had ceiling joists of the same dimensions?

A. I think they were narrower.

506 Q. You think they were not of the same dimensions?

A. Although I am not sure—positive—of that.

Q. Both sets of these joists spanned the building and were set in both walls, were they not?

A. Yes, sir.

Q. The floor of the building rested on floor joists, did it not?

A. Yes, sir.

Q. And they were of the same size as the ceiling joists?

A. I believe so.

Q. And these floor joists also went into the side walls—were set into the side walls, were they?

A. Set on the rock foundation and the wall built in between them and up.

Q. The entire building was constructed on a lot where the soil consisted of a course of adobe two or more feet thick, underlaid with gravelly sand?

A. I do not know what was under the whole building: I know nothing about the sand except as I saw it at the excavation.

Q. Well, was that the character of the sand where you saw it at the excavation?

A. The gravelly sand appears coarser to me than what that sand was at that excavation.

Q. How did you describe that sand?

A. I would say it was a fine sand.

Q. Now, on the lot immediately adjoining that building, there was an excavation extending five feet under the length of the east wall of your building, from the north corner toward the
507 south?

A. That is the way it appeared to me.

Q. This excavation extended in a slanting way under the northeast corner of that wall, did it not?

A. Yes, sir.

Q. To what distance under the foundation?

A. Possibly a foot and a half or two feet, at the bottom of the foundation.

Q. Eighteen to twenty-four inches?

A. That is the way it appeared to me.

Q. Was there any other excavation under that wall?

A. There was another one beyond that and another one further on.

Q. Under the wall?

A. No, sir.

Q. There was no other excavation under that wall, was there, Mr. Ruppe?

A. I do not know.

Q. If there was you did not see it?

A. If there was I did not see it from where I stood: I could not see whether they were under the wall or not.

Q. There was a bench of earth in its natural state extending about three feet to the east of the wall, immediately south of the excavation at the northeast corner, was there not?

A. There was a bench of dirt there.

Q. And that bench of earth was about five feet in length from north to south, was it not?

A. That is what I would judge it to be.

Q. And immediately south of that bench of earth there was another excavation about five feet in length from north to
508 south, along but not under the foundation of the wall, was there not?

A. I do not know whether it was under the wall or not.

Q. But if it was under the wall you didn't see it?

A. From where I stood I could not see it.

Q. And that excavation was about five feet deep was it?

A. That is something I cannot tell.

Q. You do not know about that?

A. The ground was sloping up.

Q. Sloped up toward the wall or sloping up toward the east?

A. Sloped up toward the south end of the lot.

Q. Now, Mr. Ruppe, when was it, to the best of your recollection, the foundation of the adobe wall on lot number one was removed—the stone foundation?

A. I do not remember.

Q. I want to ask you one question along the other line first: that wall of that building was erected on a stone foundation, was it not—the wall that fell?

A. Yes, sir.

Q. And you know the width of that foundation?

A. I have no way of knowing except by approximating, and I would say a foot and a half.

Q. About eighteen inches?

A. At least.

Q. At least eighteen inches?

A. Yes, sir.

Q. And that foundation was set in the ground?

509 A. In laying the foundation they undoubtedly dug a trench.

Q. And the foundation was about three fe-t high, was it?

A. I believe so.

Q. When was it that you first kenw that excavating was going on on lot number one?

A. To the best of my recollection, in June.

Q. And that is the best you can do, to say it was in the month of June?

A. Yes, sir.

Q. You don't know whether it was one, two or three weeks before the wall fell?

A. No, I cannot positively state that.

Q. You were in town all the time?

A. Yes, sir.

Q. You had your attention called to the fact that excavating was going on in that lot?

A. I saw it daily.

Q. Talked with people about it, didn't you?

A. Yes, sir.

Q. Didn't many people tell you that the excavating on that lot was liable to throw the wall down?

Mr. WOOD: I object to that as not proper cross-examination.

A. (Witness interrupting.) No, sir.

The COURT: He has already answered.

Mr. WOOD: I will withdraw the objection, but it seems to me that that line is entirely outside of anything that we touched upon.

510 The COURT: Well, he testified about some precautions he took at sometime, after he saw the wall start to fall.

Mr. WOOD: That is it—after he saw the wall start to fall, but nothing prior to that, that I recollect. I will withdraw this particular objection because the witness has answered.

Q. You say nobody ever told you that the excavating on lot number one was liable to throw the wall down?

A. Not the excavating in itself—no.

Q. You saw daily the progress of that work, didn't you?

A. Yes, sir.

Q. What, if anything, did you do toward preparing for the possible weakening of that wall, during the process of that excavation?

Mr. WOOD: I object to that as incompetent and not proper cross-examination and as attempting to get testimony upon their affirmative defense from this witness, who has not testified or been asked concerning that subject.

The COURT: Objection sustained.

Mr. FIELD: We except, and offer to prove by the witness in answer to the question, that he never did anything, and took no steps toward protecting that wall prior to the time it fell.

Q. Did you take any steps whatever toward protecting
511 that wall prior to the time it fell?

A. No, sir.

Q. When did you first become apprehensive that the excavation on lot number one would throw down your wall?

Mr. WOOD: I object to that as not proper cross-examination and on the same ground as stated in the former objection.

The COURT: Objection overruled.

Mr. WOOD: We except.

A. The same day as the fall of the wall.

Q. What time of the day?

A. I do not remember positively the hour.

Q. How long before Aban Sandoval came into the store to point out the crack to you?

A. I cannot fix the time.

Q. It was before that, was it.

A. Yes, sir.

Q. You don't know whether it was half an hour or four hours before?

A. No, sir.

Q. What was it caused your apprehension, Mr. Ruppe?

A. Mr. Spratt, a tailor that worked for Booth in the New Town, came into the store and asked me to go outside and look at what they were doing in the corner under the wall of the store occupied by me; and I hunted for Grande——

Q. I have not asked you that: I asked you what caused you to be apprehensive?

512 Mr. WOOD: I submit the witness is answering and should be permitted to continue his answer.

The COURT: If he is still telling of what caused him to be apprehensive he can go on.

Mr. WOOD: It is certainly consistent with that view.

The COURT: Perhaps the talk with him allayed his apprehension.

After argument.

The COURT: I think he is entitled to complete his answer, and if any part is objectionable it can be struck out. I cannot stop the witness on an uncertainty of what he is going to say.

A. (cont.). And I could not find him; and in looking at the hole I became apprehensive that they were getting pretty close to the wall.

Mr. FIELD: Now, I ask that that part of the answer of the witness in which he says that he hunted for Grande and could not find him be withdrawn from the consideration of the jury, as not responsive.

The COURT: Yes, it is withdrawn from their consideration.

A. Now, you cannot ay at what time of the day that was that Mr. Spratt, the tailor, came in and asked you to go out?

A. No, sir.

Q. Do you know whether it was in the morning or in the afternoon?

513 A. I stated it was in the afternoon.

Q. But you do not know what time in the afternoon?

A. No, sir.

Q. And what did you do when you became apprehensive?

A. I spoke with some men in the hole there, and they told me there was no danger, so I went back into the store again.

Q. And you had no apprehension after that until Aban Sandoval came in and called your attention to the crack?

A. No, sir.

Q. And you made no effort even after that, to get your wall propped, or to prop the wall in any way?

Mr. WOOD: We object to that unless it refers to the time that the witness has testified to as when the wall commenced to fall, as not proper cross-examination.

The COURT: Objection overruled.

A. The assurance of Mr. LaDriere——

The COURT: No, that is not the question.

A. No, sir.

Q. Now, on the trial of this action which took place in November, 1906, did you not testify as follows: "Now, you say that for four or five days you were notified by the people that there was danger of your building falling? A. I did not say for four or five

514 days: I saw that on several occasions prior to the building falling, people called my attention to the fact that the excavations were getting dangerous for my premises, and I thereupon called upon Mr. Weinman and spoke with Mr. LaDriere and they assured me that there was no danger: consequently, I felt satisfied." Did you so testify?

A. Yes, sir.

Q. Well, then, when you said a while ago that nobody had called your attention to the fact that the excavation on lot number one might be dangerous to your wall you were mistaken?

A. No, sir.

Q. But it is a fact that they did then, for days before the fall of the wall—that people did call your attention to the possibility of danger to your building from the excavation on lot one?

A. I do not know how many, nor do I know exactly when, but people spoke to me about the excavation on lot one, and then I took the steps as indicated on that former testimony.

Q. Then you were apprehensive that the wall might fall before Mr. Spratt, the tailor, spoke to you that afternoon?

A. No sir, I never was apprehensive until that time.

Q. That was the first time you had any apprehension—what caused you to go and talk with Mr. LaDriere and Mr. Weinman?

A. A man naturally would on any information of that kind: I did not know what they intended to do.

515 Q. At the time that you talked to Mr. LaDriere and Mr. Weinman you didn't think there was any danger of the excavation on lot one affecting the wall of your building, did you?

A. No, sir.

Q. And you never did have any apprehension about that until Mr. Spratt, the tailor, told you in the afternoon you better go out and look?

A. That was the day that they were gettingg close to the wall, and that is what made me apprehensive, because, Mr. LaDriere, in the conversation you refer to assured me that would not be done.

Q. But after you went out and the men in the hole told you there was not any danger, your apprehension was entirely removed and you had no further thought of danger until Aban Sandoval came in and showed you the crack?

A. Yes, sir.

Q. Now, didn't you have a conversation with Mr. LaDriere two or three days before the building fell, with reference to the possibility of injury to your building from that excavation, in which you said to Mr. LaDriere, in substance and effect, that you would just as soon sell your stock to Barnett in a lump, as not?

Mr. WOOD: I think, if your Honor please, that they are going over the entire ground of their defense with this witness in cross-examination. I cannot see where we opened the door to it, and I object to it as improper cross-examination.

The COURT: Objection overruled.

516 A. I had many conversations with Mr. LaDriere—nearly daily, but do not remember of any conversation as such having taken place.

Q. Do you deny that you had such a conversation at the time indicated by the question?

A. I do not remember of ever having had a conversation with him at that time or in there, on the subject you mention.

Q. Did you not, Mr. Ruppe, two or three days before this wall fell, have a conversation with Mr. J. L. LaDriere at your store touching the question of danger to your building from the excavation on lot number one, and did you not, in that conversation, say to Mr. LaDriere that you would just as soon sell your stock to Mr. Barnett in a lump, or words to that effect?

Mr. WOOD: I object to it as being a repetition in substance and detail, of the former question, which has been answered.

The COURT: Objection overruled.

A. I may have had a conversation as respecting the danger as stated, but I do not remember of my having stated that I would just as leave sell out to Mr. Barnett in a lump, or not.

Q. You will not say that you did not say that?

A. I feel satisfied I did not.

Q. Well, then, you say you did not?

A. That is my recollection—I did not have the conversation.

Q. You remember the conversation to which my question directs your attention, do you?

517 A. I have had various conversations with Mr. LaDriere. He was a daily customer at the soda fountain and I may have spoken with him on the subject of the danger and all such things as that, but that particular remark there I do not remember.

Q. Did you have daily conversations with him about the subject of the danger?

A. No, sir.

Q. Do you remember to have had any conversation with him on the subject to which my question draws your attention, two or three days before the wall fell?

A. Yes, sir.

Q. Now, in that conversation did you or did you not say to Mr LaDriere, in substance and effect, that you would just as soon sell your stock to Joe Barnett in a lump, or words of like import?

A. I believe not—I believe I did not.

Q. You don't know whether you did or not?

A. I feel sure that I did not.

Q. Didn't Mr. LaDriere, in that conversation, suggest to you the practicability of having the inside props put in your building?

A. No, sir—right the opposite.

Q. What do you mean by right the opposite?

A. He told me that he thoroughly understood his business, that there was no danger in any way, form, shape or manner—as he put it, "This Frenchman knows his business."

Q. Now, you remember that conversation very distincly, do you?

A. Yes, sir.

518 Q. And all that was said in that conversation?

A. That particular point I distinctly remember.

Q. But whether at that time you said you would just as soon sell your stock to Joe Barnett in a lump, you do not remember?

A. Yes, sir—I do not remember that.

Q. Between the time of that conversation now to which you have just been testifying, and the time when the wall fell, what if any, steps did you take toward protecting your building from possible injury by reason of the excavation on lot number one.

A. None at all.

Q. Now, I believe you said that you were standing at a show case writing when Aban Sandoval came in that afternoon to show you that crack?

A. Yes, sir.

Q. Where was that show case—which one of the show cases was that?

A. It was about the third show case from the front.

Q. How far was that from the front?

A. About forty feet.

Q. How many people were in the store at that time?

A. There was quite a lot of people there, I cannot state positively.

Q. But approximately is all I want to know.

A. Oh, I would say at least seven or eight people at the soda fountain.

Q. Did you know who any of them—can you name any
519 of them?

A. I remember one lady, Mrs. A. H. Myers.

Q. Do you remember anybody else?

A. No, sir, I do not.

Q. Just what did Aban Sandoval say to you when he came in there?

A. He told me in Spanish "Get out of here as quickly as you can, your wall is going to fall," he used a phrase that I cannot interpret exactly—but if you will permit me I will give it in Spanish—he said "The wall is kind of crumbling down."

Q. What did you do?

A. He showed me the crack in the wall and I immediately rushed out telling the people to get out as quickly as they could, the wall was falling—ran out to the front—hollered for Grande—La Driere; asked the men working there for props—studding—sent one of my clerks for Mr. Weinman and Mr.—Marshal McMillen appeared there and assisted in ordering the people out as quickly as he could, and I wanted to go back to get the cash register and he stopped me from going in and I stood close to the car track and watched the wall come down.

Q. Weren't the people all out of the building before Marshal McMillen got there?

A. They were standing around by the door—Marshal McMillen was there pretty prompt.

Q. Well, now describe all that you saw and heard while you were inside of the building and before you came out: I mean on the occasion when Aban Sandoval came in there.

A. I saw the crack—run to the front door and heard the
520 frame of the window cracking, and ran outside.

Q. You didn't hear the frame of the window cracking before you got to the front door, did you?

A. No, sir.

Q. Did you hear it when you were standing right there looking at the crack?

A. No, sir.

Q. You didn't hear it until you got down there by it?

A. Until I got there.

Q. Was that crack increasing in size all the time?

A. I did not stay there to see—as soon as I saw the crack I started right out.

Q. You saw the crack—you scooted immediately and you didn't stop to look for anything else?

A. I ran out to get props and see if I coul dnot stop it.

Q. You left your customers in the store, did you, and went out to get props?

A. No, sir, when I went by I hollered to them to get out.

Q. They went out, did they, before you——

A. They got up, some of them didn't quite understand it and we had to hollow at them.

Q. Weren't they just as anxious to get out, apparently, as you were, after the crack was pointed out?

A. Possibly some of them didn't understand when I went
521 by them so hurriedly what I was talking about.

Q. Mr. McMillen was not there when you went out, was he?

A. He appeared promptly there, he must have been in close proximity.

Q. And now describe again just what you saw after you got out.

A. I saw the northeast corner of the front break to pieces and forced out toward the sidewalk. The corner post fell over the sidewalk—a few of the adobes and the wall appeared to me to gradually slide into the foundation—into the excavation—then there was an immense amount of dust, and until that subsided nothing further could be noticed.

Q. Now, how far to the north was the front forced, as you say?

A. Judging by the roof, as it lay after the fall, possibly half a foot.

Q. And you say that the front section of the adobe wall which was attached to the post, or to which the post was attached, fell out on the sidewalk?

A. Yes, sir, it separated from the main wall.

Q. How much of that wall fell on to the sidewalk?

A. I saw—I do not know how much, I saw quite a number of adobes laying there.

Q. You saw the wall crack there, did you, before it fell, or did you not?

A. No, sir.

Q. You didn't see that wall break off from the front: the only way you know it broke off is that you saw the adobes on the
522 sidewalk, is that it?

A. Yes, sir, when the corner post came down over the sidewalk.

Q. And along with that corner post on the sidewalk were some adobes which you think came from the wall: now is that right—or that you know came from the wall?

A. Yes, sir.

Q. Well, which is it, that you know came from the wall or which you think came from the wall?

Mr. Wood: Is not this trifling: those adobes surely didn't come up out of the cellar. I object to it as a waste of time.

The Court: He may answer.

A. I believe they came from the wall.

Q. You didn't see the wall break at that place prior to the fall, did you, Mr. Ruppe.

A. No sir, I didn't see it break.

Q. And when you saw the wall sliding off the foundation as you have described, into the excavation, it was sliding off in a solid mass, was it not?

A. As I saw it then, that is the way it appeared to me.

Q. No break in the wall from the top to the bottom, and no longitudinal break, but the whole side of the house was sliding off of the foundation into the excavation?

A. With the exception of the break that Aban showed me and the separation of the front post—with some adobes, I did not see any other break and believe that the way I saw it, it slid into the
523 excavation.

Q. You didn't see the wall buckle or double up about the point of that bulge, when it was falling?

A. No, sir.

Q. How wide was that crack when you first saw it?

A. At the hurried glance I gave it, at the top it might be two to four inches.

Q. No more than that?

A. I just remember it in my mind as a black opening there.

Q. And how far down the wall did it go?

A. I could not state, because the back shelving was against it.

Q. And how far down the wall could you see it?

A. To the top of the corners of the shelving.

Q. And how far was that from the ceiling?

A. I can only approximate that—that could have been possibly five feet.

Q. Was the crack the same size from the top to the bottom, when you saw it?

A. No, sir, it was wider on top.

Q. I will ask you, Mr. Ruppe, if on the last trial of this case you didn't testify as follows: "The wall tipped to the north forcing the front post with about three or four feet of adobe, which fell over the sidewalk, and the balance of the wall tipping to the front—slid off into the lot next door."

A. Yes, sir.

Q. That is your present recollection of it now?

524 A. That is what I believe to be about the way it appeared.

Q. And about three or four feet of the north end of the wall fell on to the sidewalk?

A. That is what I believe by what I learned.

Q. From what you saw, is it not?

A. I saw the adobes that fell with the post over the sidewalk, and judging by what I learned, I believe it was three or four feet that must have fallen.

Q. Didn't you say a while ago that you only saw a few adobes on the sidewalk?

A. Yes, sir.

Q. And now what is your present recollection, was there three or four feet of the north end of that wall on the sidewalk, or were there just a few adobes there?

A. A number of adobes fell across the street—sidewalk, and the balance went down into the excavation.

Q. Well, is your present recollection that three or four feet of the north end of that wall fell over on the sidewalk?

A. Yes, sir.

Q. Did you say anything about—in your testimony or examination in chief, how the adobes lay?

A. I do not remember.

Q. After the wall fell whether some were weather side down or the others weather side up?

A. No, sir.

Q. Well, now do you know how they appeared after the wall fell?

525 A. The weather side was up of what I saw.

Q. You saw no adobes in the wreck with the weather side down?

A. No sir: I did not stay there to see any excavating done afterward.

Q. Then it is your present belief that the whole wall fell one way, with the weather side up?

Mr. WOOD: I object to this question of belief: and it is not proper cross-examination.

The COURT: His recollection is what is wanted.

A. That is my present opinion.

Mr. WOOD: I have an objection here.

Mr. FIELD: I am asking him about his recollection.

Q. Is your present recollection, Mr. Ruppe, that that wall fell with the adobes weather side up, and that there was no break in it in the process of falling, except the break which you have described—the part which went to the north?

A. I did not see any break while it fell, and my belief is as I have expressed it.

Q. Do you distinguish between your belief and your recollection?

A. My belief and recollection are based on what I saw.

Q. I suppose so: did any part of that wall fall under the roof?

A. There was a part——

526 Q. I am not asking you now what you found after the wall fell, but I am asking you if you saw any part of that wall fall under the roof at the time of the falling?

Mr. WOOD: Does counsel desire to withdraw his former question: if not I ask that the witness be permitted to answer the question as asked.

The COURT: I suppose the second question was an explanation of the first.

A. I do not know.

Q. If any part of the wall fell under the roof you did not see it when it was falling?

A. I could not possibly have seen it.

Q. Did the roof break at the same place that the wall broke—at the crack there fifty-three feet—which you have described?

A. I believe it did, sir.

Q. The roof from the break in the wall toward the north, came down, did it not?

A. Not completely.

Q. Well, just describe it, Mr. Ruppe.

A. The back part of the roof where the crack was, was hanging on but sagged down over the store—one rafter ay upon the cash register—supporting it from the floor. A few rafters were laying on the floor—touching the floor towards the front, and the front part of the roof was in the corner right upon the electric piano.

Q. Now, the part of the roof which was supported by the wall back of the point where the crack occurred and the wall fell, remained in place, undisturbed, did it?

527 A. The whole west side, with the exception of a wrenching toward the north, was still in the west wall.

Q. And the east side was in the east wall as far as the east wall stood up, was it not?

A. Back of the crack, yes.

Q. The roof from the crack back, remained in place and undisturbed?

A. Yes, sir.

Q. Now, you went in under the roof sometime after the wall fell, of the same evening, did you not?

A. At once—as soon as the dust cleared away.

Q. How soon?

A. It might have been ten or fifteen minutes.

Q. Now, the shelving which stood on the east side-adjoining the wall—was crushed right down, was it not?

A. Yes, sir.

Q. Did you find, when you got inside of that room after the wall fell, any adobes which you thought came from the east wall of the building?

A. Yes, sir.

Q. How many?

A. It is impossible for me to give you a definite answer to that, might have been twenty or might have been ten: I never made any attempt to count them.

Q. Well, what was there about those adobes that indicated to your mind that they came from the east wall of the building?

A. Their appearance.

Q. Describe their appearance.

528 A. The east wall is papered in blue paper and I remembered seeing that blue paper on the edge of the adobes; and then there were some that were weather beaten, showing erosion by water—moisture—rain—makes me recognize them as belonging to the fire wall.

Q. You saw some adobes under that roof that you thought came from the fire wall?
A. Yes, sir.
Q. How many of them were there?
A. I do not remember.
Q. More or less, approximate them.
A. I cannot do so.
Q. Well, can you explain to the jury how those adobes from the fire wall got under the roof?
A. When the wall slid into the excavation, as soon as the bottom of the wall touched the bottom of the excavation it fell over against my foundation and I—and some of those adobes undoubtedly slid back on the floor.
Q. Well, the fire wall was above the roof all the time, was it not?
A. Yes, sir—those adobes might have slid on down on the floor when the roof came down.
Q. Well, how could they get under the roof—they were above the roof?
A. When the roof fell it lay in an angle and would naturally leave a space between the edge of the floor and where they touched—that is where those adobes lay.
Q. But they were not under the roof, they were outside of the roof?
A. Those on the east wall were outside of the roof. Those
529 on the west wall were under the roof.
Q. You do not understand me to ask you anything about adobes from the west wall, do you?
A. I understood you to ask me how many adobes were under the roof, loose on the floor.
Q. My question is intended to be confined entirely to the adobes from the east wall, Mr. Ruppe: now, with that understanding of the intention of the question, do you desire to change any answer you have made?
A. I will state that the adobes—that I believe that the adobes that came from the east wall were laying on the edge of the floor on the east side of the room.
Q. And not under the roof?
A. Those were not under the roof.
Q. Mr. Ruppe, can you from memory alone, unaided by the bill of particulars or by any other writing or memorandum of any kind, enumerate to the jury any article or articles which you can testify positively as a matter of memory, were lost or destroyed at that time?
A. Yes, sir.
Q. Please do so.
The COURT: You mean articles of the stock?
Q. Stock and fixtures.
A. The electric piano, looking glasses, show globes, glass in sponge case, marble slab for soda fountain, fruit bowls, cigar show case, cigarette show case, glass—double plate glass in show case—
show cases—front glass in show cases—back shelving and
530 office chair, spoons, soda water glass holders, fruit in bowls, one clock, cigars, cigarettes and brushes—hair, cloth and

tooth; stationery, shoulder braces, abdominal belts, military sets, toilet sets, manicuring sets, chamois skins, baby rattles, looking glasses, patent medicines, Payne's Celery Compound, Hostetter's Bitters, Coyote Water, Piparazine Water, Sarsaparilla—I cannot remember any more now.

Q. That exhausts your memory as to the articles you say were totally destroyed at that time; now, can you from your memory, unaided by any reference to the bill of particulars or any other memorandum of any character, tell the quantity and value of these articles that you have enumerated?

A. I cannot tell the quality, and of some of them I could tell the price, such as standard patent medicines, but as regards the sundries, I could not give the prices, as there are different prices to the goods.

Q. Well, can you tell the value: do you know the value of the electric piano?

A. Yes, sir.

Q. What was the value of the electric piano?

A. $674.50.

Q. How do you arrive at that value, Mr. Ruppe?

A. That is what it cost me laid down and set up in my drug store.

Q. And that is what it cost you paid for in monthly payments, was it not?

A. Yes, sir.

Q. Do you know what it would have cost you: how much
531 less if you had paid for it in cash?

Mr. WOOD: We object to that on the ground that it does not appear that it cost any more nor any less if paid for in cash: there is no evidence to that effect.

Mr. FIELD: I have the right to assume some things in cross-examination.

Mr. WOOD: I do not think you have in the form of that question.

The COURT: He may answer the question.

A. I do not know.

Q. You do know, however, that you could have bought it for less if you had paid for it in cash, do you not?

A. I do not.

Q. You did not inquire?

A. No, sir.

Q. Now, how did you purchase this piano?

A. Through Mr. Buckley, the agent.

Q. How much did you pay down on it, and how much did you agree to pay monthly?

A. I do not remember the exact amount of the monthly payments.

Q. You do not remember how much you paid down, do you?

A. No, sir.

Q. Did you pay anything down?

A. I do not know, sir.

Q. Now, you mentioned a looking glass: do you know,
532 as a matter of memory the value of that looking glass?

A. No, sir.

Q. Unaided by the bill of particulars, you are unable to tell as to the value of that looking glass?

A. Yes, sir.

Q. Show globes you mentioned, are you able to tell as a matter of memory the value of those show globes?

A. No, sir.

Q. Glass in sponge case: are you able to tell as a matter of memory the value of that glass in the sponge case?

A. Two dollars, if I remember right.

Q. Marble slab for soda fountain: can you tell as a matter of memory, the value of that marble slab?

A. Thirty dollars.

Q. Fruit bowls, how many fruit bowls were there?

A. I cannot tell from memory.

Q. Then of course you cannot tell as a matter of memory, what they were worth?

A. I had several kinds and do not know which ones were destroyed now.

Q. Cigar show case: you can remember the value of that, as a matter of memory?

A. Yes, sir.

Q. How much was that worth?

A. Seventy-four dollars.

Q. Cigarette show case: can you answer as to that, as to the value, from your memory?

A. That was ten dollars.

533 Q. Top glass in show case: can you remember, as a matter of memory, what the value of that was?

A. Fifteen dollars.

Q. Front glasses in show case: can you remember as a matter of memory what the value of that was?

A. I believe three dollars apiece.

Q. How many were there?

A. If I am not mistaken, two.

Q. That would be six dollars then: back shelving, can you remember, as a matter of memory, what that back shelving was worth?

A. Two hundred and twenty-five dollars.

Q. How do you arrive at that, Mr. Ruppe?

A. Firstly, because I have bought shelving at various times; secondly, by inquiry from carpenters.

Q. Those are the two methods by which you arrive at the value?

A. And the catalogs which I have—naturally.

Q. How many linear feet of shelving was there?

A. I do not remember now.

Q. Do you know what shelving of that character is worth a linear foot?

A. No, sir.

Q. That $225 is a mere estimate on your part of the value of that shelving, is it not?

A. Is what it would cost me to replace it.

Q. You give that as your personal knowledge of what it would cost you to replace it, yet you do not know how many feet
534 of it there was and what it was worth a foot?

A. The contractor is the one that told me what it would cost to replace it.

Q. Well, then, you know because somebody told you that it would cost you that much to replace it?

A. And from, as I stated—from my own knowledge—I could testify whether it was high or cheap or fair—without the catalogs I can not remember what shelving is worth.

Q. Was not that just plain shelving, such as is made every day by carpenters?

A. No, sir.

Q. What kind of shelving was it?

A. It had doors to it.

Q. Don't carpenters in Albuquerque make shelving with doors to it every day here?

A. Yes, sir.

Q. Who was this carpenter that told you it would cost $225 to replace it?

A. I believe Mr. Hayden.

Q. The same Mr. Hayden who was a witness in this case in your behalf?

A. Yes, sir.

Q. And office chair: can you tell, as a matter of memory, what that office chair was worth?

A. No, sir.

Q. Spoons: how many spoons were there, can you tell as a matter of memory?

A. No, sir.

Q. Of course then you cannot tell how much they were worth if you cannot tell how many there were?

535 A. I do not remember what the spoons cost me—those I lost.

Q. Soda water glass holders: how many were there of those?

A. I cannot tell by memory.

Q. You cannot tell what they were worth then, as a matter of memory?

A. No, sir.

Q. Fruit in bowls: can you tell, as a matter of memory what that was worth?

A. No, sir.

Q. One clock—that clock didn't belong to Mr. Ruppe, did it?

A. No sir.

Q. Can you tell, as a matter of memory, what that clock was worth?

A. Nothing.

Q. Cigars: how many cigars did you lose, can you tell as a matter of memory?

A. No, sir, I cannot.

Q. Then of course you cannot tell as a matter of memory, what they were worth?
A. No, sir.
Q. You answer the same as to cigarettes?
A. Yes, sir.
Q. Can you tell how many hair brushes?
A. No, sir.
Q. And of course you cannot tell what they were worth?
A. No, sir.
Q. You answer the same as to the clothes brushes?
A. Yes, sir.
536 Q. And tooth brushes?
A. Yes.
Q. And stationery?
A. Yes.
Q. And the abdominal belts?
A. Yes, sir.
Q. And the shoulder braces?
A. Yes, sir.
Q. Baby rattles?
A. Yes, sir.
Q. Military sets?
A. Yes, sir.
Q. Toilet sets?
A. Yes, sir.
Q. Manicure sets?
A. Yes, sir.
Q. Chamois skins?
A. Yes, sir.
Q. And looking glasses?
A. Yes, sir.
Q. Now as to the Payne's Celery Compound, can you tell how much Payne's Celery Compound you lost?
A. No, sir.
Q. Of course, then, you cannot tell how much it was worth?
A. I do not know how much I lost was worth.
Q. Is your answer the same as to the Hostetter's Bitters?
A. Yes, sir.
Q. And Swayne's Panacea?
A. Yes, sir.
Q. The Coyote Water?
537 A. Yes, sir.
Q. And the Piparazine Water?
A. Yes, sir.
Q. And the Sarsaparilla?
A. Yes, sir.

Mr. FIELD: I think that is all I wish to ask the witness.

Mr. MANN: The defendant Weinman moves to strike out all the testimony of this witness with reference to the value of the electric piano, for the reason that the witness has shown that all he knows is what he paid for it, which is not the true measure of value; and

also moves to strike out the testimony of the witness with reference to the back shelving because it is shown to be based upon hearsay and not upon any knowledge of the witness.

Mr. FIELD: The defendant Barnett joins in that motion, and I wish to state that after the examination of the witness is completed it is the purpose of the defendant Barnett to move to strike out all the testimony of the witness.

The COURT: The motions are overruled.

Mr. FIELD: Exception.

Mr. MANN: Exception.

Redirect examination by Mr. WOOD:

538 Q. You were asked concerning the list of the articles damaged but not destroyed, which was produced here upon the former trial: did that list contain all of the articles so damaged?

Mr. FIELD: I object to that as leading and not proper redirect examination, and the list itself is the best evidence.

The COURT: The evidence, I think, showed that the list was missing, at least he did not know where it was.

Mr. FIELD: He said he had not made any search for it.

Mr. WOOD: What has that to do with the question whether it contained all the articles?

The COURT: I think your question is leading on a point of that importance.

Mr. WOOD: I will change the question.

Q. What did that list show in regard to the articles lost or destroyed?

Mr. MANN: I object to that for the reason that the list itself is the best evidence, and it has not been shown to be lost.

Mr. WOOD: I merely desire to show whether or not it contained all of the articles so destroyed.

The COURT: Objection sustained.

Mr. WOOD: We offer to show by this witness and by this
539 question that the list in question was made up at the time of the last trial from memory then—that it did not and does not purport to show that all of the articles damaged are on the list, and we except to the refusal of the Court to permit us to show it; if your Honor will suggest to me in what way I can show that this list did not contain all the articles without—I will be glad.

Mr. MANN: With all due respect to the Court, I do not think it is the Court's business to suggest the manner of proof to the gentleman.

The COURT: I think the questions are leading. I thought the other was open to the objection made to it.

Q. Who made up that list?

A. I did.

Q. When did you make it?

A. At the last term of the court here.

Q. At that time state whether or not you were able to remember all the articles that were damaged.

Mr. MANN: Objected to as immaterial and cross-examination of his own witness and not re-direct examination.
The COURT: Objection overruled.

A. I was not.

Mr. FIELD: We except.

Q. What did you intend to put in that list?

540 Mr. MANN: Objected to as irrelevant, incompetent and immaterial.
Mr. FIELD: And for cross-examination of his own witness, and not proper re-direct examination.
Mr. WOOD: We did not bring out anything about the list.
The COURT: Objection sustained.

Q. What did you put into the list at that time?

Mr. FIELD: Objected to because the list itself is the best evidence.
The COURT: The question, I take it, does not refer to the items in the list, but the kind of things, which the list itself would not show necessarily. I will overrule the objection.
Mr. FIELD: Exception.

A. All those articles that I could remember as having been damaged by the wreck.
Q. Now what list were you referring to in the questions which were asked *to* you and to which your attention has been called by counsel, when you said that the wholesale value of those articles was $174.50?
A. That was the list that I prepared by memory here in the court room at the last trial.
Q. And can you tell us whether o*f* not that list contained all the articles so damaged?

Mr. MANN: Objected to as cross-examination and not re-
541 direct examination.
The COURT: Objection overruled.
Mr. MANN: Exception.

A. It did not.
Q. How did you determine the value of those articles so damaged which you have testified to as $800?

Mr. MANN: This is all objected to.

Q. What did you testify as to the value of those articles as so damaged?

Mr. MANN: Objected to as asking the witness to construe his testimony.
Mr. WOOD: It was either seven or eight hundred dollars.
The COURT: I think eight hundred.

Q. Now, how did you determine the value of those articles at eight hundred dollars, as you have testified?

Mr. MANN: Objected to as cross-examination and not proper re-direct examination.
The COURT: Objection overruled.
Mr. MANN: Exception.

A. I know the value of the goods—I had them before me; they were marked when I arrived at their value.

542 Q. When was it that you arrived at that value as eight hundred dollars?

Mr. MANN: Objected to for the same reason.
The COURT: Objection overruled.
Mr. MANN: Exception.

A. Immediately after the wreck.
Q. You testified concerning the expenses of your business as $434 a month: when did you first determine the amount of those expenses, Mr. Ruppe?

Mr. MANN: Objected to as cross-examination of his own witness, and not proper redirect examination.
The COURT: Objection overruled.
Mr. MANN: Exception.

A. When I brought the suit.
Q. In answer to counsel, he used the word in his question—estimate the expense: do you know what your expenses were and did you know at the time when you made up the amount?

Mr. FIELD: Objected to as leading and not proper re-direct examination.
The COURT: Objection sustained.
Mr. WOOD: We except.

Q. What did you mean by the word "estimate" as you
543 used it?

Mr. MANN: Objected to on the same ground.
The COURT: Objection overruled.
Mr. MANN: Exception.

A. I mean as the result I arrived at by calculation and figures.
Q. What bank did you do business at during the time of this lease?

Mr. FIELD: Objected to as not proper re-direct examination and as immaterial.
The COURT: Objection overruled.
Mr. FIELD: Exception.

A. Bank of Commerce.
Q. Of the City of Albuquerque?
A. Yes, sir.
Q. Still in business here?
A. Yes, sir.

Q. You stated, Mr. Ruppe, that in answer to a question of counsel that a bookkeeper could not ascertain from your books the amount of your net profits during the period in question: why could he not?

Mr. MANN: I object to that as not proper re-direct examination, and as cross-examination of his own witness.

544 Mr. WOOD: I will change that question.

Q. What additional information from that contained in your books would be required?

Mr. FIELD: Objected to as calling for a conclusion of the witness and not proper re-direct examination.

The COURT: Objection overruled.

Mr. FIELD: Exception.

A. He would need the expense and merchandise account.

Q. Some testimony was given here, Mr. Ruppe, in regard to the key—or the cash register being locked: will you explain the construction of the cash register—as to what part of it was locked when you were away?

A. The cash register has a slide which covers the plate on which the figures are—if I want to see the figures on the cash register I unlock it, push back the slide and read the amount punched up. This does not lock the drawer, it simply locks the slide where the figures are on.

Q. Counsel asked you concerning some talks with La Driere about selling to Barnett your stock, or something of that kind. Did you ever have a talk with La Driere upon that subject prior to the fall of the wall?

Mr. FIELD: I object to that as not proper re-direct examination.

The COURT: Objection overruled.

545 Mr. FIELD: Exception.

A. I had a conversation with him, I believe several months prior to the fall of the wall, in which he asked me——

Mr. MANN: Now wait a minute.

The COURT: He has not asked what it was.

Mr. WOOD: I will add to my question—I will limit my question, to any conversation had with him after the excavating commenced.

The COURT: He can answer it that way, then—after the excavating began.

A. I asked him——

Mr. MANN: Wait a minute: the question was whether he had a conversation with him on that subject.

The COURT: After the excavation began.

A. No, I did not.

Q. When was the time that you had the conversation that you gave to counsel, when he said "This Frenchman knows his business," or something to that effect?

A. That was some days prior to the wreck.

Q. Now give us that conversation in full.

Mr. MANN: Objected to as incompetent and irrelevant and immaterial and not proper re-direct examination.

546 The COURT: Objection overruled.

Mr. MANN: Exception.

A. Mr. LaDriere told me that there was no danger, as he thoroughly understood his business; that there would be no excavation made under the wall until he had the rock, mortar and everything ready in place; that he was superintending that himself and that every precaution would be taken.

Mr. MANN: The defendant Weinman moves to strike this from the record, for the reason that it is not made in his presence, or not in any way, binding on him.

A. I have not finished yet.

The COURT: Let him finish his answer.

A. Mr. LaDriere also told me, he says, "I am keeping my eye on that wall—there is not a crack in the paper and you need not to be afraid."

Q. How long had you known Mr. LaDriere?

A. Since his advent in Albuquerque.

Q. Did you know his business during that time?

A. Yes, sir.

Mr. MANN: I renew my motion.

The COURT: Overruled.

Mr. MANN: Exception.

Mr. FIELD: I desire to move to strike out the answer of the

547 witness, upon the ground that it is not proper re-direct examination and does not appear to be a conversation about which he was asked on the cross-examination, and it amounts to a self-serving declaration by the witness.

The COURT: Objection overruled.

Mr. FIELD: Exception.

Re-cross-examination by Mr. Mann:

Q. I do not know that I exactly understand the mechanism of that cash register: you say it is the disk, or slide that controls the disk that was locked when you were out of town?

A. Just simply the slide that keeps hidden from view the amount in the cash register punched up.

Q. Well, what was your object in locking that?

A. To not expose the amount of my business to the clerks—every one of them.

Q. Well, that registered every particle of cash that went into the drawer of this disc that you locked up out of sight?

A. Yes, sir.

Q. In other words, whenever anybody touched the button and put a certain amount of cash in the drawer, that registered on this disc?

A. Yes, sir.

Q. And that continued to total up the amount of cash taken in or put into that cash register until such time as that was opened up and the slip taken out?

A. Yes, sir.

548 Q. For instance, if you were away three days, it would total up the amount of cash and show the amount of cash put into that register for three days?

A. Yes, sir.

Q. And if it was a week, it would show the entire week's amount of money that went into the cash drawer?

A. Yes, sir.

Q. Did it separate—was there anything that made it, when it was locked up that way, separate the days from one another, or did they all go in under one total?

A. The register would not do that.

Q. Well, could it be changed, or would it show each day's business by days when it was locked up in that way, or would it show all of the days from the time you locked it up until you unlocked it and changed it?

A. It would show the business from the day it was locked until it was unlocked.

Q. Then, if you were away a week, it would not show how much was put in there each day of the week, but would show the total amount that was put in there during that week?

A. Yes, sir; but I would know what was in every day.

Q. Well, you would not if you were out of town, would you?

A. When I came back I would.

Q. And how would you know what was in every day?

549 A. If they took in fifty dollars today and they were punched up, and they took out of the drawer—the clerks did—ten dollars—the clerk in charge of the register at night time would take the balance of the cash out of the register, marking that also on the slip as cash, and total it up; if the next day I took in another fifty dollars—the next day another fifty—that register would show one hundred and fifty dollars in the three days, and I by that slip could balance my cash and know how much I should have on hand.

Q. Then, as to how much was in there each particular day, you had to depend upon the clerk's slip; the clerk that counted the cash?

A. Yes, sir.

Q. Because, if it was forty-eight dollars one day, as you illustrate, and fifty-two the next, the result would be just the same, would it not: the result would be fifty dollars each day?

A. No, it would show forty-two one day and fifty-eight the next.

Q. Would the cash register show that?

A. No, sir, the cash register would not.

Q. The cash register would show one hundred dollars?

A. The cash register would show one hundred dollars.

Q. So, in making up this detailed statement that you put on your book, you were compelled to make that from the slips placed in there by the clerks.

A. I had to have that at my expense, and had to use it.

Q. Now, with reference to this list that you were asked about by Mr. Wood—about that memorandum of stationery that was partially destroyed or injured—not entirely destroyed—did you say that you made that list here in the court room?

A. Not that one.

Q. Which one was it that you made in the court room?

A. The one that I was asked to make by memory and which footed up one hundred and seventy-four dollars and some odd cents.

Q. You made that here in the court room?

A. I started to commence figuring it up here.

Q. Now, I want to ask you if, at the other trial, when you were asked—the last term—were asked about the memorandum, you didn't testify as follows:

Q. When did you make this memorandum that your have referred to? A. I commenced that memorandum at once, as soon as I found out the case was to be retried. Q. About when was that; how long ago? A. Approximately three weeks. Q. And how did you determine the articles that you have put upon that memorandum: and how did you reach the decision that those articles were there? A. I continually kept the question in my mind and whenever I felt positive of something that I remembered, I would put it down on the memorandum book or piece of paper. Q. And for how long a time were you making up this memorandum? A. I finished this writing yesterday. Q. Why did you make that memorandum? A. Because you demanded from me to show conclusively what those articles were, if it was possible to do so. Q. And in response to my direction that you would have to remember as many of those things as you could, you commenced to make that memorandum—— A. Yes, in response to Mr. Wood's question.

Mr. Wood: We object to that as incompetent, irrelevant and immaterial at this time—that this is a collateral matter upon this trial, brought out entirely by questions of the defence, and a matter which the plaintiff did not go into—that being a collateral matter, the defence was bound by the answers of the witness, and are not at liberty to contradict him by the record, or in any other manner.

The Court: Overruled.

Mr. Wood: Exception.

The Court: He asked you if you so testified?

A. I presume so.

Q. Well, do you know whether or not you did?

A. No, I do not remember.

Q. Can you refresh your memory by looking at this transcript of the record so as to be able to tell whether or not you did so tell us (handing paper to witness)?

Mr. Wood: I object to that as improper and incompetent; that the paper shown to the witness was not made by him, nor did he have any part in its making.

552 The COURT: Overruled.
Mr. WOOD: Exception.

The hour of twelve o'clock, noon, having arrived, a recess was here taken until two o'clock p. m.; and now at two o'clock p. m. the trial proceeds.

A. Yes, sir.
Q. Did you so testify, Mr. Ruppe, at the last trial?
A. I believe so.

Mr. MANN: That is all.
Mr. WOOD: That is all.
Mr. WOOD: The plaintiff rests.
Mr. MANN: We desire to make a motion or two, and I think it might be well to send the jury out.
The COURT: The jury may step out to their room.

Thereupon the jury retired to the jury room.

Mr. MANN: The defendant Weinman moves the Court for a verdict in his favor in this case for the reason that the testimony develops that the plaintiffs in this case, Richard Di Palma and Bernard Ruppe, were partners, under the firm name of the Cosmopolitan Pharmacy, and that the porperty alleged to have been injured and destroyed, was the property of such firm, the Cos-
553 mopolitan Pharmacy, and not the individual property of the plaintiffs in this case, and that the complaint in this case does not state a cause of action against the defendant.

Mr. FIELD: On behalf of the defendant, Barnett, I desire to move to strike out certain portions of the testimony: In the first place I desire to move to strike out all of the books of account offered in evidence on behalf of the plaintiffs in this case for the reason that it affirmatively appears that these books of account are not in themselves—do not constitute in themselves a complete system of accounts from which a bookkeeper could ascertain the amount of capital embarked in this business, or the amount of business actually conducted, or the profits thereof; that it is impossible to ascertain from these books of account the merchandise purchased and the amount of expense incurred in the conduct of the business, and also that no foundation has been laid for the introduction of them as books of account under the requirements of the statute of this territory in such cases; that by the laws of the Territory of New Mexico, Section 2650 of the Compiled Laws of 1897, and that chapter generally, a partnership is required to keep their books in due form and inventory their stock and actually keep account of all the business that they transact; that these books do not conform to that requirement: further, that it affirmatively appears that at and before the institution of this suit, and afterward, plaintiffs had in their
554 possession other evidence of a documentary character, which, taken into connection with the books of account produced here, would have enabled a bookkeeper—or a person familiar with accounts—to ascertain the extent of the business transacted by the plaintiffs, the amount of the profits and the expenses—all the other

necessary data, and it affirmatively appears that that documentary evidence was intentionally destroyed by one of the plaintiffs, Bernard Ruppe, or under his direction;

I further move to strike out all of the evidence of the witness, Bernard Ruppe, with reference to the value of goods that were damaged and the extent of damage to those goods, for the reason that there is no legal evidence which would authorize the court to submit to the jury the question of such damages, and for the further reason that no such damages are claimed in complaint, and no such item is contained in the bill of particulars made under the order of the Court.

Of course, your Honor understands, I am making these motions as separate motions, expecting they will be passed on by the Court separately, and it is to save time that I am making them one after another now, and not because I desire the Court to understand that there is any connection between them.

I further move the Court to strike out all of the testimony of the witness, Ruppe, which was given after refreshing his recollection by the use of the bill of particulars while he was on the witness stand, for the reason that no proper foundation was laid for
555 permission to the witness to use the bill of particulars for the purpose of refreshing his recollection; and it affirmatively appears that that bill of particulars was a copy of another list which was contained in a book which was lost; that the loss of that book was not sufficiently established, and for the further reason that if the book were here it was not such a memorandum as under settled rules of evidence the witness, Ruppe, would be permitted to refer to for the purpose of refreshing his recollection; it affirmatively appearing that it was not made at or near to the time of the transactions with which it purports to deal; was not made on Ruppe's personal knowledge, but was made up over a period of months of time in which he listed in that book such articles of merchandise as he missed out of his stock, for months after the fall of the wall, and upon consultation with Baltes and Mallette, his clerks; and that he put on that list such articles of merchandise as were not found in his stock from time to time, whenever he did not remember that they had been sold—whenever Baltes did not remember that they had been sold, or whenever Mallette did not remember that they had been sold, or whenever all or any one of those remembered that they had had those things in stock before the removal from the building which fell down; and it further affirmatively appears that this was not a writing which was shown by the witness to be correct at the time it was made, or one which he would be authorized under the law to inspect for the
556 purpose of refreshing his memory; neither was the writing or a copy of it, legal evidence of any fact therein contained.

I move to strike out all of the testimony of the witness, Ruppe, with reference to the character of the business section of the town of Albuquerque and the relative—I do not remember just what the term was—availability, I will say that—the witness did not say that—availability of its purpose—of the various places to which he

moved after the fall of the wall, and his opinion as to how much better a place of business the one which he rented from Weinman was to the other places to which he moved—the relative availability of the business location, because no proper foundation was laid for such evidence, and in the second place there is no evidence that the defendants, or either of them, notified Mr. Ruppe to engage in business at any other place, except the Weinman place, and testimony as to these points, to which, by this particular objection attention is called, tends to mislead the jury and introduced a false issue in the case.

I move to strike out all of the testimony of the witness, Ruppe, with reference to the loss of profits, as well as all the testimony as to the amount of cash sales and his estimate of expenses, and of all testimony of that character, because in the first place no proper foundation was laid for it, and in the second place it was largely opinion evidence, and in the third place the evidence is wholly insufficient taken as a whole, together with all the other evi-
557 dence in the case, to authorize the Court to submit to the jury the question of loss of profits.

Mr. WOOD: If the counsel means by the first part of his motion that these books have not been proved to be books upon which people have settled, and things of that kind, I call attention to the fact that no such objection was made when the books were offered; therefore, it is improper to strike that out on any such ground.

The COURT: I do not suppose he really means that, Mr. Wood. The language is apparently sufficient to cover that. No such objection was made when the books were introduced.

Mr. FIELD: I do not think we undertook to say what we thought was proper foundation. I have some authorities here, if the Court would like to see them.

The COURT: On what point?

Mr. FIELD: That a man who has had evidence in his possession and has destroyed it, will not be permitted to give secondary evidence of it.

The COURT: It seems to me that would depend on the intention with which he destroyed it.

Mr. FIELD: I do not think the authorities go to any such question. I think we have some pretty sound Massachusetts law on the subject, as well as law from other states.

558 Mr. MANN: When the Court passes on my motion, I want to join in the motions to strike, if my motion is overruled for a verdict.

The COURT: There are some of these questions that perhaps I would like to hear you upon.

Mr. FIELD: It had [illegible]n my purpose to make any argument. I think your Ho[illegible] will remember, that without being fortified by authority at the last trial of the Court, I made the objection that there was a settled rule of the law of evidence which forbade a man to get secondary evidence of the contents of papers which he had destroyed; and since that trial I have had some occasion to examine the question and look for authorities, and I call the attention of the

Court to the case of the County of Joannes vs. Joseph L. Bennett, reported in 5 Allen 159——

(Thereupon argument was had)

The COURT: I understand Mr. Ruppe's testimony about this gross profit to mean this: That when he bought, for instance some cigars, he immediately put his own cost mark on them at the retail price, or his own selling price on them; that the average of the marking up he made in that way was the percentage he speaks of—the difference between what he paid for the goods and what he sold them for. Now, it seems to me that this is easier to contradict than would be the other kind of testimony. If there were clerks in the store they must know as well as he about how much his gross percentage of profit was in that way. I suppose in any business that the proprietor and his chief clerks know the margin between the wholesale marks at which they get the goods, and the retail mark at which they sell them. If they know that, they know how much more money he gets than he pays out on the goods themselves, and then, if he can determine his expense, and give that, you will get as near the profits as you ever get. While the greater part of his stock was probably quick—that is, judging from his testimony, I suppose it is a matter of common knowledge that in any drug store—probably in most any store, there lingers a considerable percentage of stocks through years, perhaps: that might in this case be small. There would be some of it which must have come in from previous years, that is, judging from the ordinary course of business; but I do not know that there is any evidence of that in the case, but it seems to me that on the whole the evidence is now quite different than what it was when it went to the Supreme Court before, and I ought to overrule this motion, which I accordingly do.

The COURT (to Mr. Mann): Do I understand you want to withdraw yours?

Mr. MANN: I wish to.

Mr. FIELD: I except to your Honor's ruling as to each one of these separate motions: as to each one of these rulings we desire an exception.

Mr. MANN: Weinman, the defendant, joins in the objections and exceptions.

Mr. FIELD: Now, in behalf of the defendant, Barnett, I move the Court to direct the jury to find a verdict for the defendant on the ground that there was a total failure of proof of the allegations of the complaint and the testimony, showing that the plaintiffs were partners, and the complaint not claiming to recover as such partners, but as individuals.

Mr. MANN: In which the defendant, Weinman, joins, and I renew the motion made on behalf of the defendant Weinman at the close of the introduction of the testimony by the plaintiffs in this case.

The COURT: I do not think there is anything further in that to be considered: do you recall anything, Mr. Wood?

Mr. WOOD: I think that was disposed of when you denied the

gentleman's motion: they testified to it before distinctly on the former trial.

Mr. FIELD: It is new to me, if it is in the record; I have never seen it.

Mr. WOOD: And if Mr. Field will examine the testimony on cross-examination I think he will find out.

561 Mr. FIELD: I have no recollection of any such testimony: no recollection of Ruppe ever having testified that Father Di Palma was his partner until he testified on this trial.

Mr. WOOD: It is my recollection that Mr. Field the day before read that identical testimony from this record and asked Mr. Ruppe if he so testified.

Mr. FIELD: Is it probable that I would be asking Mr. Ruppe if he testified on a former trial to the same statement of facts that he did here? I think if I asked him something on the trial it was inconsistent with the former trial; but however that may be, as Judge Mann says, the question is now ready for submission to the Court. Mr. Jamison is preparing to make an argument on this question, if the Court wants to hear it.

The COURT: I am not sure just what the basis of it is. How does the complaint put it—merely speaks of them as individuals?

Mr. WOOD: It says that they are the owners—that these two plaintiffs are the owners of this property (reading the complaint).

Mr. FIELD: We are insisting that these goods did not belong to these people individually, but belonged to the Cosmopolitan Pharmacy, and that partnership was an entity, and the owner of these goods, and a necessary party to the recovery.

After further argument.

562 The COURT: That question, I do not remember that it was raised before.

Mr. FIELD: We tried to show that on the last trial that they were not partners. Your Honor refused to permit us on the ground that it was not proper cross-examination. We afterward attempted to amend so as to set up testimony that they were not partners, but your Honor refused to permit us to amend, and now we are trying to raise it again.

The COURT: I do not remember your attempt to amend, but if you do remember it that is enough.

Mr. FIELD: We filed an amended answer with an affidavit of Mr. Barnett that he ascertained after the fifteenth day of September, 1909, what was the true relation between these parties, and offered to set it up in that answer.

The COURT: This is a matter which does not have to be determined at this point.

Mr. FIELD: Under the code you refused to permit us to amend.

The COURT: I did not mean that; I mean this question which you now raised—I do not know how much thought counsel for plaintiffs had given to the question, this raising of the question that they are not described as partners, but only as individuals. It has not been brought to my attention before so that I gave it any

563 consideration.

Mr. WOOD: The only question it would present, anyway,

from our point of view, is the question of defect of parties, and that must, under the code, be raised either by demurrer or answer. They have never raised it under the one method or the other, and it is therefore waived.

The COURT: I will overrule it; but I think you had better consider it.

Mr. MANN: We except.

Mr. FIELD: We except.

The COURT: As I say, I do not think you are quite ready to make a finish of this—you may on your side, but the question in this sense I do not think was raised before. I cannot see that it makes any difference, because it seems to me I should like them to amend.

After further argument.

Mr. WOOD: We will look into it.

The COURT: I will suggest that I should recall the ruling if counsel satisfies me before the termination of the case that I ought to do that.

Mr. MANN: I do not understand the Court's ruling, that they may amend if necessary.

564 The COURT: They have not asked to, and I do not know that they ever will.

Mr. FIELD: If they do, and the Court permits, we want to be allowed to do the next best thing.

Defendant's Case.

Mr. Field made an opening statement of the case on behalf of the defendants, to the jury.

Mr. FIELD: The defence will read first, the testimony of Doctor John Tascher, a witness who is dead—admitted to be dead, but who testified on the first trial of this case. It will be necessary only for the interpreter to read it to the jury, omitting the rulings of the Court, and reading from the record.

Thereupon the following was read to the jury.

JOHN TASCHER, a witness called on behalf of the plaintiffs, being first duly sworn testified as follows:

Direct examination by Mr. MCMILLEN:

Q. State your name?
A. John Tascher.
Q. Where do you reside?
A. Albuquerque, New Mexico.
Q. What is your profession?
A. Physician.
Q. How long have you resided here, Doctor?
A. Eight years the first of last April.
Q. Did you notice any excavation being done on the lot directly east of the place of business of Mr. Ruppe, in June last?

565 A. Yes, sir, I did.

Q. When was the last time you saw that excavation?

A. I saw it all the time they were excavating.

Q. I mean the last time that you noticed it particularly, before the fall of the wall?

A. I noticed it on the day that the building fell.

Q. Tell the jury what you saw there, around that building?

A. I noticed the building at various times, when they were excavating there—they first started excavating on the east side of the lot—at the corner.

Q. You are asked to tell the jury what you saw the last time you noticed the excavation before the building fell?

A. They had excavated up to the adobe wall of Ruppe's building—on the northeast corner—about, I should judge, four and a half or five feet, something like that—the excavation was practically perpendicular with the wall—some of the rough projections of the stone on the foundation wall of Ruppe's building projected over the excavation——

Q. Doctor, on the northeast corner——

Mr. CHILDERS: I do not think he had finished——

The COURT: Doctor, is that all of your answer?

A. Well, I might say that further back—further south they were not as close up to the wall—some places only two feet and as you go further south, three four and five feet from the wall.

566 Q. At the northeast corner of the Ruppe building, state with reference to the east line of the Ruppe building, as to where the west line of that excavation was?

Mr. FIELD: He has answered that question.

The COURT: He may answer.

Mr. FIELD: Exception.

A. Why, the first four or five feet the rough stones projected over the excavation.

Q. How far did they project.

A. Oh, I should say anywhere from three to five inches, I did not measure those things.

Q. Doctor did you notice as to whether the upper portion—the top of that excavation was—whether the excavation that was done there was perpendicular or not in that corner?

A. It was practically I should say, perpendicular.

Q. Which part Doctor extends further to the west—the upper part or lower part of that excavation at the corner of the sidewalk—next to the side walk?

Mr. FIELD: Objected to because the witness testified that it was practically perpendicular.

The COURT: You may ask him whether it was absolutely perpendicular: I do not know what he means by practically perpendicular.

567 Mr. MCMILLEN: Does the Court rule the question out?

The COURT: Yes: if not changed——

A. I probably can explain that—why I said practically, if it is admissible.

The COURT: If they want it they will be seeking it.
Mr. MCMILLEN: What is the Court's ruling.
The COURT: I think the question is somewhat of a conclusion.
Mr. MCMILLEN: We except.
Mr. MARRON: Now explain it.

A. What I meant by that is that it was to the eye—it would seem to me to be perpendicular—I did not measure it—I did not have a plumb.
The COURT: As it seemed to you?
A. Yes, sir.

Examined by Mr. MARRON:

Q. How deep was the excavation in that corner?
A. In my opinion anywhere from seven, six and a half to seven and a half feet.

Examined by Mr. MCMILLEN:

Q. How far did that extend back—that depth?
A. Oh, I should say from four to five feet.
Q. Was the excavation back of that, or further south of that as deep as the excavation in the corner?
A. No, sir.
568 Q. What was the depth of the excavation further south?
A. I should say it varied—as you went further south the excavation was less.
Q. From five feet south——
A. Anywhere from five feet—then it got less, to three feet, as you went further south on the north line.

Cross-examined by Mr. FIELD:

Q. What time was it you observed this condition there with reference to the time the building fell?
A. It was about four o'clock in the afternoon—I think between four and five o'clock.
Q. On the afternoon of the day upon which the building fell?
A. Yes, sir.
Q. And the building fell about what time?
A. I believe it fell somewhere near about six o'clock.
Q. Were all of the foundation stones under the Ruppe building, at the corner, exposed or only a part of them?
A. I did not quite catch the drift of your question.
Q. I understood you to say that some of the rough stones of the foundation extended over the excavation—three to five inches?
A. Yes, sir.
Q. Now, I ask you if all of the foundation stones were exposed or only a part of them?
A. Why, I should say the north four or five feet were exposed, on the north end of the wall.
569 Q. That is just exactly what I want to get at—how far south were those stones of the foundation exposed?

A. Anywhere from five to six or seven feet: I do not exactly know.

Q. But you would put that as the limit—five or six or seven feet?

A. The whole foundation—a part of the foundation was exposed all the way along, clear back—I mean the whole foundation.

Q. How deep was the foundation where it was all exposed?

A. I think that the stone foundation was about eighteen to twenty-two inches—somewhere along there.

Q. Now, that part of the foundation which was exposed, south of the five or six feet you talk about, had been exposed from the time the wall of the other building had been pulled down, had it not?

A. I guess that is right.

Mr. FIELD: That is all.

Which concluded the reading to the jury of the former testimony of the witness John Tascher.

Mr. FIELD: We next offer the testimony of Levi R. Thompson, in evidence here, as given at the former trial of this cause, it being admitted that the witness resides beyond the jurisdiction of this Court, in the State of California.

Thereupon the following testimony was read to the
570 jury:

LEVI R. THOMPSON, a witness introduced on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. FIELD:

Q. State your name?

A. Levi R. Thompson.

Q. What is your business Mr. Thompson?

A. I have been in the real estate business.

Q. State whether or not you had a contract to remove the building—an adobe building, that was situated on the southwest corner of Second street and Railroad avenue, in the City of Albuquerque?

A. I had.

Q. Do you know when that building was removed?

A. Three or four years ago.

Q. Is that the best you can do in the way of dates?

A. It was along in May—the latter part of May or the first of June, I think I finished it up—I think my contract was to have it done by the first of June.

Q. 1902.

A. 1902, I think.

Q. Can you tell what you did with the stones out of the foundation of that building?

A. *We*, I removed a part of them, and a part of them I sold as we took them out—a portion of them were put on the part of the lot that we had cleaned off—the most of them were piled to one side and laid on the sidewalk.

571 Q. Do you know when the Ruppe building fell?
A. I was not in town at the time.
Q. Well, do you know when you took out that foundation of the Talbot building—the building on the corner—the foundation of the adobe wall next to the Ruppe building?
A. You mean as to dates?
Q. Yes.
A. No: it was along towards the last of May.
Q. Now, describe to the jury the condition of the east wall of the Ruppe building, after you got out the foundation of the corner building—I mean the west wall foundation of the corner building?
A. As I remember, it was out of plumb and leaning to the west a little.
Q. Well, are you able to express an opinion as to whether or not the removal of the wall on the corner building weakened the east wall of the Ruppe building?

Mr. Wood (interrupting reading): I think that question is objectionable: It is incompetent and not a proper subject for expert testimony.
The Court: I do not know that there was a former objection—what question was raised——
Mr. Wood: It did not take the form of an objection, apparently. We object to it on the ground it is incompetent and not a proper subject for expert testimony and as calling for a conclusion of the witness about a matter which is for the determination of the jury.
572 The Court: He did not express an opinion that I can see.
Mr. Field: He did.
The Court: He told what the appearance of the wall was.
Mr. Field: He said he was able to express an opinion, but he didn't say categorically what that opinion was, but he described the appearance of the wall to the jury.
The Court: Yes, but he didn't give any opinion that I can see by reading the record.
Mr. Field: That is what I am saying: He said he could express an opinion but didn't do it.
The Court: I will overrule the objection.
Mr. Wood: We except.

(And here the reading was resumed).
Mr. McMillen: You answer that by yes, or no, Mr. Thompson.
A. Yes.
Q. On what is that opinion based; your experience in such matters?

Mr. Wood (interrupting reading): I would like to have the record show our objection on similar grounds to all the questions which precede the one about to be read.
573 The Court: Overruled.
Mr. Wood: Our objection and exception is to the rule as to each of these questions, which appear on page 387 of this record of the former trial—the printed record.

Mr. FIELD: I think you had better state the questions in the record.

Mr. WOOD: They are: "Q. On what is that opinion based: your experience in such matters? A. No; I never had any experience in that line before, to speak of. Q. Well, is it then based upon the appearance of the wall? A. Yes; sir, from the appearance of the wall. Q. Now, describe as well as you can to the jury what that appearance was? to all of which we object as in connection with the preceding questions it calls for the conclusion of the witness and to give his opinion rather than a fact, and that — is incompetent.

The COURT: Overruled.

Mr. WOOD: We except.

Thereupon the reading of the testimony to the jury was resumed.

A. No, I never had any experience in that line before, to speak of.

Q. Well, is it then based upon the appearance of the wall?

A. Yes, sir, from the appearance of the wall.

Q. Now, describe as well as you can to the jury what that
574 appearance was?

A. Well, I cannot very accurately—I know it was out of plumb; it seems to me now that that was my opinion, but just exactly how I cannot—it is so long ago.

Q. Now, state whether or not there was a crack in the wall?

A. My opinion is that the wall that I took down was the wall that had the crack in it.

Mr. FIELD: I suppose he means his recollection is.

A. Yes, my recollection is.

Q. You told Mr. Childers the other day, in conversation with him at his office—in Zeiger's café—that there was a bad crack in this wall when you took the other wall down?

A. I told him my recollection was that there was a crack in the wall, but I was not certain of it—that is my recollection—that there was a crack.

Q. Has your recollection been refreshed now, or have you simply become doubtful?

A. I have refreshed it; been trying to.

Q. Well, what is your present best recollection about it?

A. My recollection is now that the wall that I threw down first was the wall that had the crack in it; I could not be positive about it.

Q. Didn't you in that conversation say that this crack was about half way back, about fifty-five feet from the front of the building—back from the front of the building?

A. Yes; I said I thought it was forty or fifty or sixty
575 feet—about fifty feet would be my recollection.

Q. What is your recollection now as to which wall that crack was in?

A. The wall that I pulled down.

Q. Now, have you any recollection as to the condition of the east wall of the Ruppe building, when you completed the removal of the west wall of the Talbott building?

Mr. WOOD (interrupting reading): We object to the anwer to that

question upon the ground that it expresses merely an opinion and conjecture without any facts: It is a guess of the witness and gives his conclusion and is therefore incompetent.

The COURT: I will sustain that objection.

Mr. FIELD: We except. We except to the ruling of the Court refusing us permission to have this answer read to the jury.

(Thereupon the reading of the testimony to the jury was resumed).

Q. You describe to this jury as well as you can the appearance of that wall?

A. Well, I do not know that I can describe it very accurately; I have the recollection that the wall was out of plumb, but just to what extent I cannot say.

Q. Have you any recollection as to whether or not there was a horizontal bulge in the wall?

A. It seems to me there was.

Q. Can you describe that to the jury—the location of it?

576 A. I do not think that I can very intelligently—it occurs to me that the wall leaned to the west and then swerved out again toward the bottom.

Q. Can you tell the jury whether or not the centre of gravity of the wall was within the foundation or outside of it?

A. I do not know to what extent it was.

Cross-examined by Mr. MCMILLEN:

Q. You went to California about the first of June in the year 1902, did you not, Mr. Thompson?

A. Yes, sir.

Q. And all the work of removing the old Talbot building on the Barnett lot had been completed before you went?

A. Yes, sir.

Q. Now, the stone that you kept you had hauled to another lot for use, had you not?

A. Yes, sir.

Q. And the rest of the stone had been sold to Mr. W. Strong and removed by him?

A. Strong got some and Mr. Hahn got some.

Q. Had they removed the stuff before you left?

A. Mr. Hahn got the smaller stone, and Mr. Strong got the large stone—I think Mr. Hahn had his hauled away, and I think there were very few of the others when I left—they were taking them away when I left—possibly half a dozen large stones were on the ground when I left.

Q. All of the smaller stone had been removed?

A. Yes, sir; that is my recollection.

Q. Those large stones that you speak of were large sand

577 stones were they not?

A. Yes, sir.

Q. And where were they at the time you left?

A. They were lying nearest Second street—over on—near the walk.

Q. They were not put on the walk?

A. No, sir.

Redirect examination by Mr. FIELD:

Q. You do not know where they were after you left, do you?

A. No, sir.

Which concluded the reading of the testimony of Levi R. Thompson to the jury.

And now, the hour of five thirty o'clock having arrived, an adjournment was taken until tomorrow morning, at 9:30 o'clock.

And now, at 9:30 a. m., on this April 6th, 1910, the trial of this cause proceeds, pursuant to adjournment:

Mr. FIELD: We offer in evidence that tax schedule, which is a part of the lost papers, referred to in the bunch of clippings.

Which said offer is referred to as defendants' exhibit 1.

Mr. WOOD: I would like to have the record show the source from which Mr. Field is reading the paper, which he has now offered in evidence, as one of the papers which was lost, among these others, which were heretofore described: I do not know that the record shows that otherwise.

678 Mr. FIELD: I think I so stated.

The COURT: I suppose it does show that.

Which said exhibit 1 is in words and figures as follows, to-wit:

"DEFENDANTS' EXHIBIT 1."

Schedule of Real and Personal Property Belonging to R. Di Palma, a Resident of Precinct No. 26, in the County of Bernalillo, Territory of New Mexico, on the First Day of March, 1902.

Oath or Affirmation.

TERRITORY OF NEW MEXICO,
County of Bernalillo, ss:

I, R. Di Palma, do solemnly swear (or affirm) that I am a resident of the County of Bernalillo; that, according to the best of my knowledge and belief, the within list contains a full and correct statement of all property in the County and Territory aforesaid, which I, or any firm of which I am a member, or any company or corporation of which I am president, cashier, secretary, manager or agent, own, possess or control, and which is not already assessed, and that the values given therein are the true market values of such property.

R. Di Palma, first duly sworn, on oath deposes and says that he is the head of a family residing in this Territory, and as such has listed the within described property for taxation; that the property

therein mentioned as — is the family homestead actually owned, occupied and used as such by h-; that its true market value
579 is — Dollars, which valuation includes said real estate and the improvements thereon. (In case affiant is head of a family and his homestead does not equal $200 in value the difference may be deducted from personal property as per Sec. 8 of Revenue Law, printed on back hereof.) Affiant therefore claims the benefit of the exemption laws of this Territory to the extent of $— on said homestead and to the further extent of $— to make up the amount of $200 exemption on property herein listed.

——— ———.

Subscribed and sworn to before me this 27th day of March, 1902.
ALEJANDRO SANDOVAL, *Assessor.*
H. S. KNIGHT, *Deputy.*

Real Estate.

Description.
Fraction or other description. Sec. Twp. Range.
No. of acres. Value per acre.
Give boundaries and describe real estate by metes and bounds.
Value of lands. Value of improvements.
Total value land and Improvements.
Total assessed value.
Interest legal or equitable claimed in any confirmed land grant.
City and Town lots and houses. Fraction or other description. Addition. Lot. Block.
Wagon or Turnpike Road.
Telegraph or Telephone Lines.
580 Mining or manufacturing Ditches.
Toll Bridges.
Toll Roads.
Irrigating Ditches.
Water storage reservoirs.
Total Value of Real Estate.

Personal Property.

Description. Where situated. No. Value per head. Total Value.
Horses, Thoroughbread.
Horses, American.
Horses, Half Breed.
Saddle Ponies.
Colts.
Mules.
Cows, American.
Bulls, Graded.
Beef and Stock Cattle.
Oxen.
Sheep, Imported or Fine.

Sheep, Graded.
Sheep, Mexican.
Goats, Cashmere.
Goats, Common.
Swine.
Burros.
Wagons, Carts, Trucks.
Carriages and Vehicles of all kinds.
Saddles, Robes and Blankets, Harness.
Sewing Machines.
Average value of merchandise during year ending March 1, 190-.
Rappe Drug Store, $1,200.
Amount of capital employed in manufactures.
§81 Farming Implements.
Fixture of saloon, office or other business places.
Money on hand.
Bonds, warrants and coupons.
Books—Law, Medical, Miscellaneous.
Watches and Clocks.
Jewelry, Gold and Silver Plate.
Musical Instruments.
Household furniture.
Shares of stock in Corporations or associations.
Shares of stock in National or other banks.
Wheat, bushels.
Oats, bushels.
Barley, bushels.
Corn, bushels.
Hay, tons.
Wool, pounds.
Lumber, feet.
Ores, tons.
Coal, tons.
Steam engines.
Saw Mills, Flouring Mills, Steam.
Tools, Carpenters', Blacksmiths', etc.
Mines, surface improvements.
Mines—Net product.
Credits—Notes, Book accounts, etc.
Deductions, Actual Indebtedness, from actual credits only and not from property.
Balance subject to Taxation.
All other property not herein enumerated.
Total value of personal property.

Territory of New Mexico, Precinct No. 26, County of Bernalillo.

582 *Property Return of R. Di Palma.*

Recapitulation.

Value of real estate	.....
Value of personal property	$1,200
Less exemption	.....
Total amount	$1,200

Examined and proved by the Board of County Commissioners, 7-7, 1902.

E. A. MEIRA,
Chairman Board of County Coms.

ED. STEINER, a witness on behalf of the defense, being first duly sworn, testified as follows:

Direct examination by Mr. FIELD:

Q. What is your name?
A. Ed. Steiner.
Q. Where do you live?
A. North of Albuquerque, about one mile.
Q. What is your business?
A. Contractor and builder.
Q. Where were you employed in the month of July, 1902?
A. Working for Mr. Anson.
Q. State whether or not you did any work in connection with the removal of the debris of the wall—fallen wall of the Ruppe building, near the corner of Second street and Railroad avenue?
A. I helped to excavate some there.
Q. In what capacity?
A. Well, I helped take out foundation and rock and stuff there.

583 Q. Who was foreman of the work?
A. Well, now, I could not say who it was—I was working for Mr. Anson.
Q. Do you know a man by the name of Charles Swanson—was he working there at that time?
A. Yes, sir, he was working there the same time I was.
Q. During all of the time?
A. I think so.
Q. Well, now, describe to the jury what you did with reference to cleaning up that place, and just what you found.
A. Well, I helped to dig out the foundation out of the trench and hauled it away.
Q. What foundation, and out of what trench?
A. At the east wall of Ruppe's building at that time.
Q. Now, describe to the jury how you found the foundation after you got the debris which was over it removed?

A. The foundation was all in its place.
Q. The entire foundation?
A. Well, excepting a little bit in front.
Q. Well, what was the condition of the foundation over the excavation at the northeast corner of the wall?

Mr. Wood: I object to that upon the ground that this witness has not testified to any excavation existing at the northeast corner of the wall, and counsel in his opening statement to the jury said there was none, as he expected to prove.

584 Mr. Field: Well, that is the most extraordinary statement! I did not say that I expected to prove there was not any. I distinctly said there was an excavation at the northeast corner of the wall, and all of the witnesses who have testified so agree.

Mr. Wood: This witness has not said anything about the excavation.

The Court: I will sustain the objection.

Mr. Field: Exception. I offer to show by the witness that the foundation which had been above the excavation at the northeast corner of the wall, had fallen into the excavation.

Mr. Wood: We do not object to that being shown in the proper manner.

Mr. Field: We take our chances that this is the proper manner to show it, and have taken an exception.

Q. Now, from what point was the foundation in place, as you have stated it was.
A. About forty or fifty feet south from the front, excepting of a few feet in front of the front corner—the northeast corner.
Q. Now, tell the jury just what you mean by that, as to how the foundation was at the northeast corner, and how it was from the northeast corner back to the point where the wall broke?
A. I do not remember how the wall was at the corner exactly, but from the corner two or three feet back—40 or 50 feet,
585 the foundation was in the trench; that is, in its place.

Mr. Field: That is all.

Cross-examination by Mr. Wood:

Q. How far back from the front corner—the northeast corner of that wall, was the foundation entirely gone from its place?
A. Well, I could not say—about forty or fifty feet of foundation was in its place—the other work was done when I commenced.
Q. But you have spoken of a place under the northeast corner of the building—under the front of that wall nearest to Railroad avenue, where the foundation had fallen—was out of its place—now, how long a space was that, commencing at the sidewalk and running back under the wall?
A. About two or three feet.
Q. Was that all?
A. That is all that I remember.
Q. Is your memory less acute on that point than when you testified on the former trial?

A. That is as near as I can remember it.

Q. Upon the second trial of this action, were you not asked this question:

The COURT: You better give the time.

Q. In November or December, 1906, were you a witness when that case was then tried?

A. I think so.

Q. Now, upon that trial, were you not asked this question—were you not asked this question, and did you not give the
586 answers as I will read them to you:

"Cross-examination by Mr. MCMILLEN:

Q. You did not find any stone next to the sidewalk? A. No, they had been hauled away when I commenced working. Q. I am not asking you what had been hauled away; just answer my question and nothing else; how far back from the sidewalk was it before you saw any stone? A. I should judge there was about eight or ten feet, something like that, when I commenced."

Q. Did you give that testimony at that trial?

A. I do not remember.

Q. Well, what do you say now, was it eight or ten feet, or as much as that from the sidewalk, running back, that the stone was entirely gone from the position of the foundation?

A. I said two or three feet.

Q. Well, was this testimony, as you gave it then, true according to your recollection as it was then?

Mr. FIELD: I object to that as not a proper question, and not for the witness to say whether his testimony was true.

Mr. WOOD: I say true, according to his recollection, as it then was.

Mr. FIELD: He said he does not remember having given any such testimony.

Mr. WOOD: Perhaps I should say "the" testimony, instead of "this" testimony.

587 Mr. FIELD: I object to it for the same reason.

Mr. WOOD: I will use the word "the," instead of the word "this" in the question.

The COURT: Do you intend it to refer to what you have read, alone, or to his entire testimony?

Mr. WOOD: This question I intend to refer to his entire testimony.

Mr. FIELD: I still object to it, because it is not proper or competent to ask the witness to characterize his testimony on the former trial.

The COURT: Overruled.

Mr. FIELD: Exception.

A. I do not remember saying that.

The COURT: He has not asked you about that alone now, but whether your testimony at that time was true.

A. It was true as far as I remember, but I do not remember saying ten feet.

Q. Were you not further asked in the course of that cross-examination, this question:

"Q. Now, from Railroad avenue back ten feet, there was no foundation at all?"

Q. And did you not answer it:

"A. No, sir, not when I commenced."

Q. Were you asked that question, and did you so answer?

588 A. I do not understand you now.

Q. Upon this trial which took place in 1906, were you not asked this question:

"Q. Now, from Railroad avenue back ten feet, there was no foundation at all?" And did you not answer that question:

"A. No, sir, not when I commenced?"

A. I do not remember it.

Q. Will you say that you did not so testify?

A. Well, I might have said it, and I might not: I could not say.

Q. You cannot say then that you did not so testify?

A. I cannot say positively.

Q. Well, what is your recollection as to whether or not that fact were true, that from Railroad avenue there was no foundation back ten feet?

A. Well, I remember that there was about two or three feet under the corner, if I remember right.

Q. Well, it has been a long time since then, has it not, Mr. Steiner?

A. It has been a long while.

Q. Well, is your recollection of those circumstances as good now, can you say, as it was in 1906?

A. Sure, I cannot remember what happened fifteen or twenty years ago—that is true—like I would if it happened yesterday.

Q. Certainly not: well, what do you say as to whether your recollection was better in 1906 concerning these matters than it is today.

A. I do not know as it was.

589 Q. You do not know that it was any better?

A. No.

Q. Have you used any means very recently, or since you have been here present on this trial, to refresh your recollection as to what took place back at that time?

A. No, sir.

Q. Didn't you go out in that room yesterday with Mr. La Driere, and didn't you and he together read over this testimony from this book, that you gave back in 1906?

A. He read part of it to me, I did not read.

Q. Did he read to you this part that I have just now read to you?

A. I think so.

Q. Well, did you think that it was not true when he read it to you; that you had made a mistake?

A. I remember that I didn't know that I had said eight or ten feet—I told Mr. La Driere I thought there was a mistake there.

Q. Didn't you, on the last trial here, which took place last Decem-

ber, testify again that there were eight or ten feet of that wall missing?

Mr. FIELD: I object to that question because no proper foundation has been laid for it, as an impeaching question.

The COURT: Overruled.

Mr. FIELD: Exception.

A. I do not think I did.

590 Q. Now, did Mr. LaDriere tell you yesterday that you were mistaken, that there were not eight or ten feet, but only three or four feet of that wall that were missing?

A. No, sir.

Q. Did he tell you what his recollection was as to how much of it was missing?

A. He did.

Q. Well, how much did he tell you was missing?

A. He said two or three feet.

Q. You think his recollection yesterday was better than yours in 1906, do you?

A. I do not know if it was, or not.

Q. Well, is that what caused you to change your testimony, if you did change it, your talk with Mr. LaDriere yesterday?

A. No, sir.

Q. Now, he read over all of that testimony to you yesterday as far as you know?

A. He might have. I do not know whether he did or not. I could not read, and he read me part of it, I know.

Q. But you remember distinctly his reading to you this particular part about eight or ten feet, don't you?

A. He read that, sir.

Q. And you discussed that question with him out there yesterday as to how much of that wall was missing at the front end?

A. I might have talked about it.

Q. Did you?

A. Yes, sir.

Q. Now, from the space ten feet back, at least, you say, the

591 foundation wall was all in place back to forty or fifty feet?

A. Yes, sir.

Q. And you say it was in the trench.

A. It was in the trench.

Q. And in its place—not tipped over.

A. It was in its place, straight.

Q. How deep was that trench?

A. I should judge two feet.

Q. And what was the character of the foundation stones that were in it?

A. You mean what quality of rock?

Q. Yes, what kind of rock?

A. This right up here—white rock. If I remember it might have been sand stone, some of it.

Q. Well, would you say that it was not all red sand stone?

A. I would not.
Q. It might have been all red sand stone?
A. It might have been, and might have been not.

Redirect examination by Mr. FIELD:

On that former trial were you not asked——

Mr. WOOD: Excuse me a minute. If your Honor please, I have asked the stenographer to get the testimony of Mr. Steiner on the trial in December. I shall wish to recall him when I get that, but I probably will not be able to do that until after dinner. With that exception I am through.

Mr. FIELD: We will take care of that when he testifies.

Q. Mr. Steiner, state whether or not on that trial of the
592 case in 1906, you were asked the question which I am about to read to you, and gave the answer which I am about to read to you:

"Q. Describe to the jury how you found that foundation? A. The foundation was all right, except a couple of feet, I should judge, from the northeast corner next to Railroad avenue, back about forty feet, or something like that."

Q. Did you so testify in 1906?

Mr. WOOD: We object to that as a self-serving declaration—withdrawn.

A. Yes, sir.

Mr. FIELD: That is all.

Recross-examination:

That was at the same trial where you testified to these other things I have asked you about on cross-examination, was it not?

Mr. MANN: That is objected to because the witness has not testified he did testify about them: he said he didn't remember.

The COURT: I understood him to say the things he asked him about.

Mr. WOOD: I want the witness to understand which trial he is talking about——

Q. Did you understand the question?
A. That is at the last trial.
Q. Which trial did you understand Mr. Field to ask you about in his last question?
593 A. This last trial, if I recollect right.
Q. That is the one last fall?
A. Yes, sir.
Q. Well, Mr. Field was asking you about the trial that took place back in 1906: do you mean that you recollect testifying at that trial back in 1906 as Mr. Field just read to you?
A. I think I testified that two or three feet.
Q. Well, how are you able to remember so distinctly that you did

testify as he has asked you, and you cannot remember at all as I have asked you, reading from the same record?

A. I do not remember stating eight or ten feet.

Q. But you do remember stating what he has read?

A. I remember, yes, sir.

Q. Now, Mr. Steiner, do you mean to tell us that you remember, or do you mean to say you think you must have testified to that, which?

A. Well, I think I said that.

Q. Do you remember saying it?

A. I could not say as I remember saying it.

Mr. WOOD: That is all.

Mr. FIELD: That is all.

CHARLES SWANSON, introduced as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. FIELD:

Q. What is your name?

A. Charles Swanson.

594 Q. What is your business?

A. Well, I have been working in cement lately—cement work.

Q. Look at this picture and tell me whether or not there is a photograph of yourself in there. (Showing small photograph to witness.)

A. It looks like me, all right.

Mr. FIELD: That is plaintiff's Exhibit G.

Q. What was your occupation in the month of July, 1902?

A. Well, I guess I was cleaning out that basement there.

Q. Who were you working for?

A. Mr. Anson.

Q. State whether or not you were present in charge of that work at the time that the broken adobes were taken off the foundation there.

A. Most of the time I was there—when I was there I had charge of it.

Q. Now, Mr. Swanson, pay attention to the question: Do you remember having been there when the foundation was taken off of that foundation of the wall that fell?

A. Yes; I was.

Q. Describe to the jury the foundation when the adobes were taken off of it.

A. Well, I don't understand you exactly.

Q. (Repeated.)

The COURT: That is, I suppose you mean the shape it was in.

Q. Yes—how did it look: what was its condition?

595 A. Well, there was caved in—the wall was caved in and we put it in the wagons.

Mr. FIELD: That of course is not an answer to the question.
Mr. WOOD: It is a good beginning.
Mr. FIELD: The witness speaks very brokenly.
The COURT: Go on.

Q. Go ahead and describe the foundation; I have not asked you about the wall. I have asked you about the foundation.
A. Well, the stone in the footing was laid in the trench for about five or six feet from the Central avenue and must have been twenty or some feet was laying in the trench all right.
Q. How was it for the balance of the way back?
A. It was out of the way—the stone was out of the trench.
Q. Now, were you there during all the time that that foundation was being uncovered.
A. Most of the time.
Q. Didn't you tell me in my office last Saturday afternoon that when the foundation was being uncovered you were at the brewery?

Mr. WOOD: I object to that as cross-examination of his own witness and an attempt to discredit him.
Mr. FIELD: I do not believe the witness understands the question and if the witness testifies to different statements from those
596 he made to me, I have a right to show it by him.
The COURT: I hardly think you have, in that way: I will sustain the objection.
Mr. FIELD: Exception: I offer to show that he did so state to me—differently.

Q. Describe to the jury exactly what you saw of that foundation; every foot of it, from the side walk back to the place where the wall broke and fell after the adobe was cleaned off of it.
A. Well, the footing was laying in the trench for about twenty or some feet, in good order.
Q. And how was the balance of it?
A. It was out of the way.
Q. Well, where was it?
A. Out of the trench.
Q. Well, where out of the trench?

The COURT: That is, where did you find it—was it up in the air or lying on the ground.

A. Oh, on the ground, I suppose.
Q. Where on the ground?
A. About in the middle of the building.
Q. It was in the middle of the building, was it?
A. About some forty feet from Central avenue, I suppose.
Q. Now, where was that foundation from forty feet from Central avnsue on out to Central avenue—where were the stones of that foundation, if you know?
A. Well, those stone was in good order about twenty and
597 some feet and the rest was out of the trench.
Q. You did not see any foundation beyond the twenty and some feet, did you?

A. I could see the stone.
Q. Where was the stone; that is, just what I want you to tell the jury.
A. It was—the stone was slide from the trench out to the basement.
Q. How much of it?
A. I should judge there would be about twenty-five feet—something like it.
Q. That was all in the cellar, was it, of lot number one?
A. It was in the cellar.
Q. Lying—how was it lying in the cellar?
A. Well, the line—I do not understand.
Q. Where did it lay in the cellar with reference to the place where it had been: How far was it from the foundation?
A. Close to the trench.
Q. Close to the trench: Was there any excavation there of any kind?
A. Yes, sir, they had been digging out the excavation.
Q. How much of an excavation was it?
A. I do not remember the depth—it was about six feet, I guess.
Q. Where was it six feet deep?
A. In the basement.
Q. All the way through the basement?
A. Yes.
Q. All the way back, was it?
A. No, not all the way back—was only half of the build-
598 ing.
Q. Well, I am talking about now from the point twenty feet back to the south, how deep was the excavation in the basement?
A. There was from two feet down to six.
Q. Where was it six?
A. In the center of the basement.
Q. What do you mean by the center of the basement?
A. Well, I mean where they got it level—they had it level in the center and in the north end of the building.
Q. Now, the center of the basement—the center of the building—there was no building there, was there?
A. No.
Q. Now, describe this excavation on lot number one to the jury, on both sides, north and south; all of it, as you remember it.
A. So far as I remember, the basement was down to six feet—half of it from the north end.
Q. All the way back up against the wall of the Ruppe building, it was six feet deep half way back of the lot?
A. Yes.
Q. Right up against the wall and all the way to the east?
A. Yes, sir.
Q. What?
A. Yes.

Q. And all the way to the front?
A. Yes.
Q. That is the way you remember it?
A. Yes, sir, that is the way I remember it.
Q. Now, I want to ask you again: if you did not tell me in my office last Saturday afternoon that at the time this foundation was uncovered you were working at the brewery, and Ed Steiner was in charge of the work.

Mr. Wood: I object to that as not proper cross-examination and as an attempt to discredit his own witness whom he has here produced and vouched for, and that the witness has not shown himself in any way to be hostile and no ground or foundation has been laid to permit counsel to cross-examine his own witness.
The Court: Sustained.
Mr. Field: Exception. And I offer to show by the witness that he did make that statement to me on last Saturday at my office: that is all.

Cross-examined by Mr. Wood:

Q. When did you go to work for Mr. Anson there, Mr. Swanson?
A. I don't remember which month it was—it was in the spring, I suppose.
Q. And what did you start doing when you went there?
A. I started to clean up the adobe.
Q. Could you tell whether or not any work had been done in the way of taking that wall out before you commenced there, from the appearance of it?

Mr. Field: I object to that because it calls for an opinion of the witness.
The Court: What wall?
Mr. Wood: He said he went to work taking out these adobe walls.
The Court: He did not say the adobe wall. I think it should be made clearer.
Mr. Field: I think we are entitled to have the ruling of the Court on it.
The Court: I will sustain the objection.

Q. Could you tell from the appearance of the adobes at the time you went in to remove them whether or not any had been removed since the fall of the wall?

Mr. Field: I object to it because it is not a question upon which opinion evidence is admissible; if it is, no foundation has been laid for the opinion of the witness, and if it is a fact, the jury can draw the inference as well as the witness, and therefore it is not proper cross-examination.
The Court: Objection sustained.
Mr. Wood: We except.

Q. Who were working there with you, Mr. Swanson, at the time?
A. Mr. Ed Steiner and about five or six Mexicans.
Q. And was Steiner the foreman there?
A. No, I was that.

Q. How long were you engaged in removing that adobe wall—those adobes?
A. Well, I do not remember exactly—about a week or so.
Q. I show you a photograph, plaintiff's Exhibit E. Look at that and tell me whether or not that is a correct representation of the wall as it appeared to you when you were about to remove it or started to remove it.

Mr. FIELD: I object to it as not proper cross-examination.
The COURT: Sustained.
Mr. WOOD: We except to the ruling of the Court in refusing to permit us to cross-examine this witness upon the appearance of the wall and we offer to show by the witness that the wall as it had fallen appeared as it does in the photograph that has been shown to the witness.

Q. Can you point out upon the photograph which has been shown to you the point where you say the excavations were?

Mr. FIELD: Objected to as not proper cross-examination.
The COURT: Overruled.
Mr. FIELD: Exception.

A. I do not need to look at it because I was there and
602 know all about it.
Mr. FIELD: I ask that the answer of the witness be taken from the jury as not responsive and as expressing the opinion of the witness.
Mr. WOOD: I think I can get what I was after in a different way: that is all.

Redirect examination by Mr. FIELD:

Q. Was not Mr. Swanson (Steiner?) foreman there of that work when you were absent?
A. Yes, he was looking at it when I was away.
Q. You were away a part of the time?
A. I was away a few hours, some days.
Q. Have you talked to anybody about this case since you talked to me about it last Saturday?
A. No, sir.

Mr. FIELD: That is all.

JOSEPH L. LA DRIERE, introduced as a witness in behalf of the defendants, being heretofore duly sworn, testified further as follows:

Direct examination by Mr. MANN:

Q. You have already testified as a witness in this case, at this trial?
A. Yes, sir.
Q. I will ask you, Mr. La Driere, when the corner lot—that is, lot number one, was clear of the building which stood there with

relation to the time that the party-wall agreement was made between Barnett and Weinman, was it before or after?

603 A. I do not remember: I think it was before.

Q. Now, were these foundation plans that have been introduced in evidence by the plaintiff and to which you testified—were they drawn before or after the party-wall agreement was made?

A. They might have been sketched before, but they were finished after.

Q. I wish you would take this foundation plan, Mr. La Driere, and point out to the jury, in the plans and the specifications which you have testified to, just what this party-wall was to be and how much it was to encroach, if any, upon lot number two: stand up in front of the jury and explain it.

A. The green drawing—wall, at letter B was to be the party wall. Now this party wall was to be set over the property line between lot one and two centrally—set over the property line of lot numbers one and two.

Q. And how thick was that wall to be—the foundation wall?

A. The footing was to be about four feet wide, and the wall eighteen inches thick.

Q. Now, explain to the jury what you mean by the footing?

A. As shown on the cross section of the drawing.

Mr. MANN: Designating the green pier.

A. Marked, section of piers.

Q. What was to have been the length of that foundation wall, from north to south?

A. From Central avenue or Railroad avenue to the alley, one hundred and forty-two feet.

604 Q. Was that wall to have gone clear to the alley to the south?

A. Yes, sir.

Q. I mean the party-wall on the——

A. Yes, sir.

Q. Now, state Mr. La Driere whether or not that wall was ever built, or that foundation plan that you have testified to, was ever carried out?

Mr. WOOD: We object to that as calling for the conclusion of the witness, and as incompetent and immaterial.

Mr. MANN: They have already shown that he was the architect, drawing the plans, and who had charge: Now I want to know if the building was built——

Mr. MCMILLEN: It does not call for the fact or anything of the kind.

The COURT: I will sustain the objection.

Mr. MANN: We except, and offer to show by the witness that the foundation plan was never carried out and that no wall of that kind was ever built.

Mr. WOOD: We do not object to their showing what was done under the plan.

Mr. MANN: I thought the objection was sustained. I had a right to put my motion in the record, and did so.

The COURT: I have ruled on the question: I thought the offer went a good ways beyond the question; but that is for others to determine.

Mr. WOOD: I had not finished my statement—have I not a right to make a statement?

The COURT: It seems to me that the offer should correspond somewhat to the question.

Mr. FIELD: If it does not, it will not avail us at all in the court of review: We are aware of that——

Mr. WOOD: I had not finished my statement—*the* both gentlemen interrupted me——

The COURT: Go on with the witness if you have anything more to ask him.

Q. Mr. La Driere, you were familiar with the building that formerly stood on lot number one, were you?

A. Somewhat, sir.

Q. You may state when, or about when, that building was removed from lot number one?

A. It was removed during the latter part of May or early part of June, 1902; as to the exact dates I could not tell.

Q. Under whose direction was that removed, if you know?

A. Under my direction.

Q. And after that building was removed, I will ask you, whether or not—who had the contract, or who was the foreman of the man who removed that building?

A. Mr. Thompson had the contract of removing the building.

Q. Was that Levi R. Thompson whose testimony has been read in this case?

A. I presume it is: I do not remember his initials.

Q. Were you here present at the first trial of this case?

A. Yes, sir.

Q. And did you hear a Mr. Thompson testify at that trial?

A. Yes, sir.

Q. You may state whether or not that was the same Mr. Thompson to whom you refer, as having had charge of the removing of the building on lot number one?

A. Yes, sir. that is the man.

Q. Now, did you observe the wall—the east wall of the building occupied by Mr. Ruppe on lot number two, after the removal of the building on lot number one?

A. Yes, sir.

Q. You may describe to the jury that wall as it stood after the building was removed from lot one?

A. The wall was out of plumb, leaning west, and also out of line forming a circle—horizontally—also working toward the west—leaning towards the west.

Q. How long have you resided in Albuquerque?

A. Ten years.

Q. How long had you resided in Albuquerque at the time that this wall fell?

A. Practically two years.

Q. Then you cannot tell the jury how long that wall had been built, from your own personal knowledge?

A. No, sir.

Q. I believe that you testified when testifying as a witness for the plaintiffs in this case, that you were an architect?

A. Yes, sir.

Q. And how long have you been an architect Mr. LaDriere?

A. Twenty-one years.

Q. During that time, state what experience you have had in building foundations and making and carrying out plans of buildings in Albuquerque and elsewhere?

A. I have had different kinds of experiences: Do you wish me to explain where I practiced?

Q. To what extent you have practiced your profession for that number of years?

A. Well, I practiced in Montana for four years, and I practiced in Chicago for eight years, and the balance of the time here.

Q. At the time that you drew the plans and specifications which have been introduced in evidence in this case, state whether or not you were familiar with the conditions at the place where this party wall was to have been built?

A. Yes, sir; in a general way.

Q. Do you know the nature of the soil on which this wall stood?

A. I knew to some extent by having built similar basements within a block or two of that locality.

Q. Now testifying from your experience as an architect, and your knowledge of the conditions that existed, state whether or not that party wall might have been built according to the plans and specifications, with safety to the Ruppe wall, had it been a solid wall, firm, straight and in line?

Mr. Wood: We object to that upon the ground that the particular conditions that did exist in the soil under this wall are not incorporated into the question, and the witness is not shown—nor is he asked if he knew what those conditions were, as they did exist there. He has been simply asked and has replied that he knew of other similar conditions in different places: the questions does not include sufficient facts upon which to base an expert opinion as to this particular wall under the conditions that did exist at that point.

The Court: That is as to the land, and the soil?

Mr. Wood: Yes—and I will add to the objection, that they were bound to deal with the conditions as they existed during the progress of the excavation as made there and not with a hypothetical condition, when it is absolutely possible to show from their standpoint exactly what those conditions were.

The Court: That seems to me to go to cross-examination.

After argument.

The COURT: I will sustain the objection.

609 Mr. MANN: We except, and offer to show by the witness that it was perfectly feasible and safe to the Ruppe wall, as it would have been, to have carried out the plans and specifications and to build the party wall in question, had it not been for the fact that the Ruppe wall was crooked, out of plumb and out of line.

Mr. WOOD: We will make no objection to their proving those facts.

The COURT: Go on.

Mr. FIELD: And we except to the refusal of the court to permit us to do so.

Q. I wish you would describe to the jury, Mr. La Driere, the condition of that wall—the east wall of the Ruppe building, and of the excavation on lot one, at or just before the time that the wall fell?

A. The conditions of the wall were as I stated before, and the excavation had been commenced on the northeast corner of lot one and pursued to practically its full depth and extended westward along Railroad avenue and southward along Second street, and practically to its completion, diminishing gradually as it went southward and the teams were—were in the habit of driving down from the alley along the Ruppe wall to get down into the hole and get re-loaded, and pull out southwardly along Second street.

Q. And to what extent did the excavation extend next to the Ruppe wall?

610 A. There was a ledge along the Ruppe wall about three feet wide at the top and sloping eastward at the bottom, where it would meet then with the slope where the teams drove down and at the northeast corner of the Ruppe building the excavation was up to the wall of the Ruppe building—about two or three feet long and to a depth possibly of seven feet or over.

Q. And what was that excavation for at the northeast corner of the Ruppe wall?

A. It was preparation of a pier to be built there.

Q. Is that the pier that is shown upon the plans that you have shown to the jury?

A. Yes, sir.

Q. And was that excavation made in accordance with those plans that you have exhibited to the jury?

A. As far as it went.

Q. Now, state to the jury, Mr. LaDriere, when that excavation you speak of at the northeast corner of the Ruppe wall was made with reference to the time the wall fell?

A. The general description that I have stated about the excavation was as I saw it at about two o'clock the afternoon that the wall fell.

Q. And when did they commence that excavation for that pier?

A. I could not state—possibly in the forenoon.

Q. Had that excavation, up as far as the Ruppe wall, at the corner—had it been there any considerable length of time?

A. I do not know—I might add to that, if you wish—I
611 do not know whether you——

Mr. WOOD: I prefer that the witness answer only the questions; and he surely has answer- that—because at this point, I think we should be advised in advance as to the answer sought——

The COURT: You are not objecting: I do not understand that you are objecting——

Mr. WOOD: We object to the witness going further at this point—to his advancing any other statement than the one called for in the question, which he has already answered.

The COURT: Ask him a question.

Mr. WOOD: I propose to, if they are through.

Q. State whether or not you were superintending that work and how often you were there at the place where this excavating was going on?

A. Yes, sir; I had charge of the work, and I would go there about as often as I would feel it was necessary under the circumstances.

Q. And when were you there prior to the last time you have testified to, about two o'clock in the afternoon?

A. I was there about eleven o'clock in the forenoon.

Q. State whether or not they had commenced the excavation of that pier when you were there at eleven o'clock in the forenoon?

A. They had.

612 Q. Who laid out that excavation for that pier, if you know?

A. Why, it was not laid out at all.

Q. To what extent had they excavated for that pier when you were there about 11 o'clock in the forenoon?

A. Why, practically the same as it was at two o'clock.

Q. Now, describe that excavation to the jury as you last saw it: Do you know when they did start that?

A. When they satrted the corner?

Q. That excavation for the pier?

A. No; I have no data for it.

Q. What I want to know, is whether you know when they started it, or not?

A. You mean starting on the contract for it?

Q. No, sir: starting the pier; when they started the work—do you know when they started it?

A. No: I do not know when they started it.

Q. Now describe how far that pier—just exactly how it was when you saw it there at two o'clock in the afternoon when the wall fell.

A. Well, there was a short distance, as I should judge, that was horizontal—about two feet—that was horizontal, from the sidewalk running south up to the Ruppe building, and they were down about seven feet.

Q. Well, where was the west line of the wall of the excavation with reference to the Ruppe wall at that time?

A. It was about the west line, yes, sir.

613 Q. East or west line of that excavation—flush or otherwise?

A. It was just about plumb, if I remember right.

Q. Now, state to the jury what other excavations there were in this bank of earth which you have described, up to or near the wall of the Ruppe building?

A. There was not more than I specified before up till two o'clock that afternoon.

Q. Did you see that situation there again after two o'clock in the afternoon, before the wall fell?

A. No, sir.

Q. Do you know where you were that afternoon, Mr. La Driere?

A. Yes, sir.

Q. Were you—where were you?

A. I was negotiating some business with Mr. Bechechi and Giomi in their place of business on First street.

Q. And who was in charge of this excavation?

A. Mr. Cæsar Grande.

Q. In removing that dirt from the excavation on lot one, how did they take it out; with scrapers, or otherwise?

A. They hauled it out with wagons.

Q. State to the jury, Mr. La Driere, what the condition of the ground was there on those lots; that is, I mean how much adobe, and so forth?

A. The character—the adobe—the top had a strata of more or less black adobe or grey adobe, leading to a yellow strata,

614 and then to sand, and the sand grows coarser as the depth was attained.

Q. Now state to the jury how thick the adobe was—how much adobe, and how much sand and so forth?

A. I have no measurements as to the different stratas there—the black, possibly, or the grey matter, on top, was possibly a foot and the yellow adobe a couple of feet.

Q. Now, in describing the wall, Mr. La Driere, I believe you stated that it was bulged out toward the east?

A. I stated that it had a bulge, and also out of line, but I did not say anything about the bulge at the bottom.

Q. Was there a bulge in the wall?

A. There was—the upright more plumb part of the wall from the foundation of the wall—a couple of feet in from the foundation—up a couple of feet or so it seemed to be—have retained its lines better than from there up—higher than from there it kinked over westward quite suddenly.

Q. Now state to the jury upon you- experience as an architect, upon what portion of that wall, or what point in that wall, the weight of the roof of the building rested?

Mr. Woon: I object to that unless the witness says he can so state——

The Court: Overruled.

Mr. WOOD: We object on the further ground that it does
615 not appear whether they are speaking about that portion of the wall that fell—they do not identify the particular part of the wall in the question.

The COURT: Answer.

A. The wall at the part where it broke was nine inches out of plumb, and stood on a foundation eighteen inches thick, and the wall itself was practically eighteen inches thick; consequently the wall was overhanging half of its weight, and if the roof joists were clear through the wall at the top, it would have made a very great difference—it would have made a very great difference, but if the joists were only set in the wall as they ordinarily are—in what we call a fire-cot; then it would have——

Mr. WOOD: If you- Honor will permit me to interrupt the witness, I will call the attention of the Court——

The COURT: I think he better finish the answer.

Mr. WOOD: May I ask then that it be not interpreted.

The COURT: Yes: The interpreter can stop.

A. (con.) —had the entire *hearing* over the centre of the foundation of the wall.

Mr. WOOD: I do not think there is anything in it I desire to object to.

Mr. FIELD: I would like to have the whole answer read for my information.

616 Thereupon the answer was read and interpreted.

Q. You say the wall was overhanging: which way, to the west or to the east? of the centre of the foundation?

A. Westward.

Q. Now, when you say that the weight was over the centre of the foundation, explain to the jury what you mean by that?

A. I do not know if I can explain it any more that I did.

Q. Well, do you mean that the weight was concentric—centred on the foundation——

Mr. WOOD: Objected to as leading.

The COURT: Sustained.

Mr. MANN: I am merely asking what he means.

The COURT: You can do that, but not lead him.

Mr. FIELD: We except to the court's ruling.

Q. State to the jury what you mean, when you say the weight was over the centre of the foundation?

Mr. WOOD: We submit that question has been asked and answered directly, already.

Mr. MANN: He did not answer it——

617 The COURT: He said he did not know whether he could explain it.

Mr. MANN: I want him to explain to the jury what he means by it.

Mr. WOOD: I have no object- to that.

A. I mean that the wall was crooked, bending westward, and was nine inches out of plumb at the top, and naturally all the part of it that was out of plumb from its base to the top—was not giving a centre stress on the foundation: then the roof joists as I described them before would had that much weight over the centre line of the foundation.

Q. When you say 'over' do you mean 'over:' Do you mean on?

Mr. Wood: I submit that the gentlemen who have objected so strenuously to leading questions——

The Court: I do not see why you should state an objection that way—I will sustain the objection.

Mr. Field: We except and offer to show by the witness that when he speaks of over the foundation, he does not mean upon the foundation but means outside of it: The language of the witness does not clearly express his thoughts, as we understand it, and we except to the refusal of the Court to permit us to have it made clear.

Q. When did you first see the wall after it fell, Mr. La Driere?

A. About half past five that evening.

618 Q. Well, do you mean the evening of the day that the wall fell?

A. Yes, sir.

Q. Now describe to the jury the appearance of the wall and of the roof as you then saw it?

A. Well the wall was crumpled down—part of it laying inside of the store and part of it on lot number one—over its foundation, and the roof was down at one end, or one side, I should say—hanging an irregular way from the point where it broke.

Q. At what point in the wall had the wall broken?

A. I did not catch that.

The Court: At what point did it break?

A. About fifty or fifty-five feet from the front, at Central avenue, or at the sidewalk.

Q. Now when you say that the wall lay over the foundation—over its foundation—state to the jury what you mean by that?

A. I mean that it covered the foundation with its broken adobes.

Q. Do you know who removed the debris of that wall?

A. Mr. A. W. Anson had the contract of cleaning that all away.

Q. Were you there when it was being removed?

A. Part of the time, yes, sir.

Q. State to the jury whether or not you saw the condition of the foundation when the adobes were removed?

619 A. Yes, sir.

Q. State what its condition was?

A. The foundation from the point where the wall broke to a point about four or five feet from the sidewalk was all intact, and in its trench; and from a point four or five feet from the sidewalk to the sidewalk it was slid down in the excavation.

Q. Now, at the time that you had charge of this excavating on lot one, and during the time that that excavation was going on, did you see Mr. Ruppe at any time?

A. Yes, sir; once in a while.

Q. State whether or not you had any conversation with Mr. Ruppe at any time during that time with reference to that excavation?

A. Yes, sir.

Q. When and where, Mr. La Driere?

A. We had one conversation either Friday or Saturday prior to the day that the wall fell, right on the sidewalk at the corner of his building.

Q. What day did the wall fall, if you know; what day of the week, I mean?

A. Monday.

Q. Now state what that conversation you and Mr. Ruppe had at that time and place, was?

A. Mr. Ruppe came out to me and asked some questions about the work, and I replied—I do not remember exactly what I said—and as he left me he remarked to me, well, I just as lief sell my stock to Mr. Barnett all at once as otherwise, or words to that effect.

620 Q. Do you remember the questions that Mr. Ruppe asked you at that time?

A. Not altogether—pertaining to the excavation however.

Q. Can you give their import to the Court and jury?

A. I answered all the questions—I do not remember exactly what I said.

Q. Can you tell the Court and jury now what these questions related to, and the nature of the questions that Mr. Ruppe asked you at that time?

A. If I remember right it was a question as to how we were going to get out of there and support the wall—it was questions relating to how we were going to get out of the wall and support it.

Q. I will ask you to state to the jury whether or not Mr. Ruppe at any time made any objections to you or in your presence as to the manner of carrying on the work, or as to the putting in of the party wall?

Mr. Wood: We object to it, as calling for the conclusion of the witness, and not asking him for the conversation.

The Court: Overruled.

Mr. Wood: We except.

A. No, sir.

Q. State to the jury whether or not anything was ever said between Mr. Ruppe and yourself as to the advisibility of propping or taking any means to protect the Ruppe wall?

A. Not that I remember of.

621 Q. Did you hear the testimony of Mr. Ruppe with reference to a conversation between Mr. Ruppe and yourself and in which conversation you said, this Frenchman knows his business?

A. No, sir.

Q. You may state whether or not you had any conversation with Mr. Ruppe in his drug store a short time prior to the time the wall fell, in which conversation Mr. Ruppe talked with you and told you that he thought it was advisable to prop up the wall on the inside, and in which you told him that it was not necessary, that this Frenchman knows his business, or words to that effect?

A. I do not remember anything of it.

(Here Mr. Mann was excused to go to the telephone).

Mr. FIELD: I have a few questions I want to ask the witness:

Direct examination by Mr. FIELD:

Q. How long had excavation been going on on that lot number one prior to the time that the wall fell?

A. I do not remember.

Q. Well, more or less, how long?

A. Possibly a couple of weeks, or a week.

Q. Well, have you any recollection as to how long that excavation had been going on?

A. No, sir; I have not: The contracts with Mr. Grande would possibly give some dates on that: I do not remember myself.

622 Q. If you had the date of the contract with Mr. Grande could you fix the date when the excavation began?

A. Why, it would get closer.

Q. How is that?

A. I could give it closer than I could by memory; but I do not remember about that.

Q. The date of the contract with Mr. Grande is the fifth day of June, 1902: now, can you state when with reference to that date the excavation commenced on that lot?

A. Well, I am quite satisfied he commenced right away.

Q. Now, can you tell whether or not the excavation was carried on continuously from that date until the time the wall fell?

A. I recollect of one day that he didn't work—besides the Sundays of course.

Q. Well, do you recollect of any other days that he didn't work, or do you recollect that he did work the other days?

A. Well, my recollection is that he worked steady, all the time, with the exception of one day—I remember it rained—one forenoon.

Q. Now, how often were you present during the time that that excavation was going on?

A. A couple of times a day; sometimes more.

Q. Tell the jury when, if you know, the first excavation was made at the northeast corner of the Ruppe wall, which passed over—passed under the Ruppe Wall?

A. I never saw any excavation under the Ruppe wall.

623 Q. You were there I believe you said about two o'clock in the afternoon of the day that the wall fell?

A. Yes, sir.

Q. And it is your recollection that at that time the excavation at the northeast corner did not extend under the wall?

Mr. WOOD: I object to that as leading, suggestive and cross-examination.

Mr. FIELD: I think it is.

The COURT: He has testified twice I think on that. Did I understand you to object, Mr. Wood, or did you merely comment?

Mr. WOOD: If it goes no further I have no objection.

Mr. FIELD: I think I have a right to ask this witness any question I choose without regard to anything he might have testified in answer to questions by Judge Mann: I am merely trying to get a basis for certain interrogatories I wish to propound to the witness.

The COURT: Go on.

A. No, sir; it didn't.

Q. Now, you were present when the debris was removed, were you?

A. Yes, sir; at that particular point I made it my business to be there.

Q. Describe the excavation when that debris was removed
624 from it?

A. Why, the cavity that had been created was filled with adobes.

The COURT: I sup-ose he meant, after it had been taken out?

A. (con.)—and the ground had been more or less tumbled in there so that there was no lines of the original excavation.

Q. Well, was there an excavation there which had been cleaned out, Mr. La Driere?

A. Please read the question.

Q. Was there a hole there that was cleaned out?

A. No, sir—after the cleaning of the ground—all the debris had gone down to the bottom of the footing—of the balance of the wall, then they proceeded to *ploy* the lot and they never cleaned that one hole by itself.

Q. That is what I wanted to know: that as far as your recollection goes that hole never was cleaned out?

A. Yes, sir; not of itself.

Q. That dirt is still there?

A. Why, no; it has been cleaned out afterward, when they excavated the entire foundation.

Q. I suppose they cleaned it out at some time, and I would like to get you to tell this jury when it was cleaned, if you will?

A. I do not know just when—it was done then in a general way after the debris was removed off of it.

Q. How long were they occupied in removing the broken adobes?

625 A. Possibly a week—I should say all of the adobes, about a week.

Q. What adobes are you talking about now?

A. The adobes were removed after the back wall — standing had been removed—they worked from behind coming to the front; so I say in about a week they were cleaned off—the adobes.

Q. The wall which didn't fall, was removed, or not?

A. It was removed.

Q. Before or after the removal of the wall which fell?

A. Before.

Q. Now describe the operation of removing the wall which fell? the debris of the wall which fell, just as you saw it done?

A. After removing the roof and the floor, they backed the wagons in there and pitched them in the wagons, and they were hauled out toward the south.

Q. Pitched what in the wagons; the roof or the floor?

A. The adobes.

Q. Well, now when the adobes were removed tell the condition of the foundation?

A. The foundation was in its place, all along, with the exception of four or five feet from the sidewalk southward.

Q. What was the materia of which that foundation was made?

A. It was red sandstone.

Q. What was the size of the stones?

A. The foundation wall itself were all small sized stones,
626 and the footing were of larger flat stones.

Q. Now, immediately before the falling of that wall can you tell the jury where the centre of gravity of the wall was, with reference to the foundation?

A. The centre of the wall at the top was nine inches out of plumb, and the wall was also bent horizontally—if I remember right, a couple of inches—so it throwed it off the centre of gravity of the foundation that much.

The hour of twelve o'clock, noon, having arrived, a recess was here taken until 2 o'clock P. M.

Q. Now describe Mr. La Driere as accurately as you can the way in which the adobes of that wall fell with reference to the foundation?

A. There was about a third of the adobes, I should judge, inside of the building, and some of them laid plastered side up and pretty well in rows—in rotation, and a larger portion was below the foundation on lot number one and more broken.

Q. What do you mean by plastered side up?

A. Why the side that had been plastered for the finish of the building.

Q. Well, do you know whether the wall had been plastered on the outside or on the inside?

A. Plastered inside.

Q. Well, when you speak of the plastered side of the adobes up, you mean the adobes which—the side of the adobes which were in the house as distinguished from the side which were exposed to the weather?

627 A. I mean the side of the adobes that was forming the finished part of the inside of the house—of the building.

Q. Do you know whether or not the upper joists and rafters that

separated this roof went through the wall—the east wall of the building, or only partly through?

A. I do not.

Mr. FIELD: That is all.

Mr. MANN: That is all.

Cross-examined by Mr. WOOD:

Q. The work of excavating and preparing for this foundation under the new building was being done by Mr. Grande as contractor under your supervision and direction, was it not?

A. Yes, sir.

Q. You wrote out and directed the work that was to be done upon the ground and Mr. Grande proceeded to cause it to be done according to your directions, so far as it was done, is that true?

A. I would have laid out for him if they had went further, but as yet there was nothing to lay out.

Q. You say there was nothing to lay out?

A. No, sir.

Q. Why you had to lay out the foundation and the position of the excavations, didn't you, and the limits of it?

A. No, sir; The City Surveyor had given us the pickets on the west line and the sidewalk—gave us the north line and the east line, and there he was working within these lines.

Q. Well had you not laid out at all the position of these piers along, say, the line of Second street?

Mr. FIELD: We object to that as not proper cross examination.

The COURT: Overruled.

Mr. FIELD: Exception.

A. Not that I remember.

Q. Why, Mr. La Driere don't you remember that the foundation wall had then been partly constructed—a portion of it at the northeast corner of the lot having been built?

A. Now, that is a question in my mind—we had not had any stone work done at all, but of that I am not positive.

Q. But you say on that point you are not positive, and you would not absolutely dispute the testimony of other witnesses, that that work had been done, would you?

A. I say I am not positive, but that is the way I have it in my mind—that we had not done any stone work at all at that time.

Q. Now, if stone work had been done there at and prior to that time, excavations for the piers shown on that plan had to be made in advance of that stone work, did they not?

Mr. FIELD: Objected to as not proper cross-examination, and part of the plaintiffs' case if he wants to prove it.

The COURT: Overruled.

Mr. FIELD: Exception.

A. If there was stone work done, certainly the piers had to be laid out.

Q. (Counsel exhibiting foundation plan to the witness.) Each of

the enlargements upon the blue line of your foundation plan, green lines, nearest to the point A, required special excavations on the ground for the purpose of making—placing those piers, did they not?

A. Yes, sir.

Q. And if stone work was built there upon the northeast corner of the lot in advance of building that stone work, you had to lay out on the ground exactly the shape of the excavation, didn't you?

Mr. MANN: Objected to as not proper cross-examination and for the further reasons because it is incompetent, irrelevant and immaterial whether any stone work had been done at the northeast corner of the lot one or not.

The COURT: Overruled.

Mr. MANN: Exception.

A. Why, not necessarily, because this plan has all the dimensions marked on there, and if that be the case then I would come around and check up those dimensions as the masons would work.

630 Q. Then did you supply this plan to Mr. Grande and direct him to make the excavations, or cause them to be made, in accordance with this plan?

A. Yes, sir.

Q. And with the aid of the city engineer then you had given him the location of the excavations, as you have testified, including the line of division between lots one and two?

A. Yes, sir.

Q. Now, if the excavation at the northeast corner of lot one had been completed for the stone work, how far would that excavation have extended under the Ruppe wall, if you know—had it been completed?

Mr. FIELD: Objected to as not proper cross-examination.

Mr. MANN: And for the further reason that the witness testified that it was not completed.

The COURT: Objection overruled.

Mr. MANN: Exception.

Mr. FIELD: Exception.

A. (Examining foundation plan.) The pier would have been five feet broad, half of which would have been over the line, less nine inches.

Mr. FIELD: I move to strike out the answer of the witness, because there is no testimony of any witness here that the excavation

631 was anything like that depth under the wall; and it is a hypothetical answer based upon no fact in the case.

The COURT: Perhaps I did not understand his answer, but I thought it differed materially from what others had said.

Mr. FIELD: I think it differs materially from what has been said all along: I think the deepest under the wall put by any witness was twenty inches, and I think the witnesses ranged from six inches to twenty, and I think Mr. Ruppe was the man who put it as much as twenty and this would put it thirty inches under the wall.

The COURT: As I understand him, he is giving you the length of the pier; I do not think he has told really how far under it would be.

Mr. WOOD: I understand it more I think as your Honor understands it rather than as Mr. Field.

The COURT: He is not asked to tell the thickness of the pier—half the thickness of the pier was to be across the line and half the thickness less nine inches would be under the wall—that is the way I understood it: He didn't tell what the thickness of it was.

Mr. FIELD: Yes; he did.

The COURT: We can make it clear what he did mean, easily.

632 Mr. FIELD: We except to the ruling of the Court.

The COURT: I think he better explain it before I strike it out. (To witness:) The question was how much the pier according to the plan would have extended under the wall of the Ruppe building, and you gave certain dimensions, but you didn't say after all how much it would have extended under the Ruppe wall, unless by inference: You can explain now.

A. Half of the pier would have been two feet six inches to the Ruppe line.

Q. What do you mean by 'to the Ruppe line?'

Mr. FIELD: I move to strike out the answer upon the ground that it is not proper cross-examination and is not responsive to the question, if I understand the question, and upon the further ground that your Honor refused to permit us to prove by the witness on direct examination that no wall was ever constructed in accordance with those plans: This is letting testimony go to the jury as to what would have been done, if the wall had been constructed, when you refused to allow us to show that it never was constructed.

Mr. WOOD: I am not asking about the wall, but the excavation for the wall.

The COURT: I will overrule the objection.

Mr. FIELD: Exception.

Q. Now, you said two feet six inches to the Ruppe wall:
633 what do you mean by to the Ruppe wall?

Mr. WOOD: Withdrawn.

Q. Now, you said two feet six inches to the Ruppe line: what do you mean by to the Ruppe line?

Mr. MANN: Same objection.

The COURT: Overruled.

Mr. MANN: Exception.

A. I mean from the exterior of that pier where it would have been up to the Ruppe line—the lot line.

Q. Yes: Now what I was asking you about was the excavation for that pier when completed in accordance with the plans that I have shown you—it would extend how far under the Ruppe wall?

Mr. FIELD: Objected to because there is no testimony to show that that excavation ever was completed in accordance with those

plans, but on the contrary the testimony is that it never was; and the greatest depth of excavation under the Ruppe wall given by any witness was twenty inches, and we tried to prove by the witness on direct examination that no such construction was done and your Honor refused to give us the right to——

The Court: Nobody is claiming that any wall was built
634 under the Ruppe building—some of the witnesses have testified something about an excavation under it—and he is asking about the excavation.

Mr. Field: He is asking about what was planned.

The Court: Objection overruled.

Mr. Field: Exception.

A. Why, if completed, if per this plan, it would have been two feet six inches from the line between lot one and lot two.

Mr. Mann: We move to strike out the answer of the witness for the reason that the same is incompetent, irrelevant and immaterial, and not proper cross-examination, it being immaterial what the plans were and only material what was actually done.

The Court: Overruled.

Mr. Mann: Exception.

Q. How far under the wall would it have extended?

Mr. Field: Same objection: It is wholly immaterial as to what would have been done; the question being what was done.

The Court: Now as to that: Of course there has been testimony on your side as to how far the wall was from the line at that point, so that it would only be a matter of computation, if your
635 location of the wall stand.

Mr. Wood: In view of your Honor's suggestion, I will withdraw that question.

Q. Do you know how far west of the line between lots one and two it was to the east extremity of the Ruppe wall, at the front, near the sidewalk on Railroad avenue?

Mr. Field: Objected to as not proper cross-examination, and wholly immaterial.

The Court: Sustained as to its not being proper cross-examination.

Q. The line—how did you ascertain the line that you have mentioned, as being the line between lots one and two, and how was it marked?

A. By the marks given me by the City Engineer.

Q. And who was he?

A. Pitt Ross.

Q. The same one who testified here in this case, was it not?

A. Yes, sir.

Q. How deep below the surface of the sidewalk would the excavation for that wall have been at the northeast corner of the Ruppe building when completed?

Mr. Mann: Objected to as asking for what might have been and

what was, and not proper cross-examination, irrelevant and tending to create a false issue before the jury.

The COURT: I think he testified that it was practically to its full depth there, and told what the depth was.

Mr. WOOD: He testified practically its full depth but didn't mention it in feet.

The COURT: I think he named the number of feet.

Mr. WOOD: If he did, I do not want it, but I have not in mind now that he did: I do not wish to repeat the testimony, if he told——

The COURT: I am very sure he has told.

Mr. WOOD: Does your Honor recollect the amount?

The COURT: Yes: but I do not want to state it to the jury.

Mr. WOOD: I will take the recollection of the Court and my associates that the witness has mentioned the depth——

Mr. FIELD: We except to the statement of the Court in the presence of the jury that the witness has mentioned any such thing: it is for the jury to say what the witness has testified to and not the Court.

The COURT: That is true; but I do not think you will succeed in pinning courts down quite so closely as that.

Mr. FIELD: I do not know that I shall succeed.

The COURT: I believe the law forbids the Court from commenting upon the weight of the evidence, but not in discussing what the evidence has been in the necessary progress of the trial: Now go on.

Q. Now, Mr. LaDriere, you say that the last time that you saw work progressing in that excavation before the fall of the wall was at about two o'clock in the afternoon, on the day on which it fell?

A. Yes, sir.

Q. How did you fix the time?

A. Well from one o'clock I had been in the office awhile and also to some building under construction before I reached that corner, and as near as I could establish it right from the first time I was on the witness stand, it was as near as I could remember about two o'clock.

Q. Well, you are not sure about the time; it might have been as late as three, might it not?

A. No; I am not positive—it was not three, but it might have been a little after two—I am positive it was not three.

Q. And you say that you noticed that excavation in the corner at eleven o'clock that day?

A. Yes, sir.

Q. They had then been digging prior to that for this pier in the corner, had they?

A. Evidently.

Q. Did you ever see the place where they were digging for that pier, or did you ever notice the excavation for that pier earlier than eleven o'clock on the day when the building fell?

A. Not more than of course Saturday prior to that they were digging towards that corner.

Q. Now you say that at eleven o'clock they had dug up flush with the Ruppe wall and straight down—do you?

A. No, sir; I did not say that.

Q. Didn't you say that they ran up flush to the Ruppe wall?

A. At two o'clock.

Q. Didn't you say that there was no change in it between eleven and two that you noticed?

A. I said that at eleven o'clock it was practically the same thing.

Q. Well, have you a distinction between practically and something else: Tell us how much difference there was between that excavation at two o'clock, as you saw it, and as it existed at eleven o'clock: explain just the difference?

A. The difference is that at eleven o'clock I did not pay very close attention to it and at two o'clock I did.

Q. Had anything been done there at all to it, between eleven o'clock and two o'clock that you know of?

A. Nothing that I know of.

Q. Then you cannot tell us that there was an inch of dirt removed between eleven and two, can you?

A. No, sir.

Q. Now at two o'clock it ran up flush with the Ruppe wall, did it?

A. Yes, sir.

Q. You examined it carefully to see, did you?

639 A. Yes, sir.

Q. And were they then digging?

A. No, sir, not at that corner—not in that corner.

Q. What was going on on the lot at that time?

A. They were loading up wagons further down.

Q. You went away and were gone until after the wall fell, weren't you?

A. Yes, sir.

Q. Was Mr. Grande there at two o'clock?

A. Not quite clear in my mind whether he was or not.

Q. Did you see Mr. Grande that day, that you recollect, before the wall fell?

A. That I do not remember clear, neither.

Q. You have no recollection then, of course, of giving him any directions that day, before the wall fell?

A. Not to him personally that I remember of.

Q. Now, Mr. LaDriere will you say there were not other excavations being made up close to the Ruppe building—to the Ruppe wall further back toward the south and along that wall—further back than this corner?

A. Do you mean in sections?

Q. Yes——

A. Not at two o'clock.

Q. Well you say there was not a second excavation about five feet back of the first, and a third excavation about the same distance back of the second, made alopg that wall at two o'clock when you

640 were there?

A. Not that I recollect.

Q. Well don't you know whether they were there or not?
A. As far as I know there was not.
Q. Did you look and examine it to see whether there were or not?
A. I looked at the whole thing in a general way, which is quite evidently what a man would do and if they had been there I would have noticed them.
Q. Were you looking at them for the very purpose of seeing how close that excavation was getting to the Ruppe wall and under it—you were, were you not?
A. I was looking and watching the progress of the work, for the fact that I wanted my specifications adhered to—the way it was drafted for to handle that work and I wanted to see that it was not violated.
Q. That is good as far as it goes, but it does not quite answer my question: You were looking to see how close to the Ruppe building—to the Ruppe wall that excavation had extended, weren't you, when you were there at two o'clock?
A. To some extent, yes.
Q. Yes: and so you will say that looking for that very purpose, you could only see the excavation at the front corner, will you?
A. Yes, sir; because there was only one there.
Q. And you are willing to stand on the proposition that that one at the front corner didn't extend under the Ruppe wall, too, are you not?

A. Yes, sir.

641 Q. You know that is true, and you cannot be mistaken about it, can you, Mr. LaDriere?

A. I had looked at it from the sidewalk—looked straight down into it, and it was up to the wall.
Q. And you want to say to this jury that you cannot possibly be mistaken that that did—you want to say that that did not exend under the wall at all, do you?
A. I was sane I think and sober and I looked at it, and it was not under the wall.
Q. Now you knew that there was danger of damage to that wall in making those excavations, did you not, Mr. LaDriere?

Mr. FIELD: Objected to as not proper cross-examination.
The COURT: I do not see how it is cross-examination.
Mr. WOOD: It would be proper cross-examination if it tended to show the care and attention that this witness must have given to the situation close to the wall and as affecting his credibility as to his being mistaken or otherwise about the matters of the excavation: for those purposes we think it is proper.
The COURT: He has already said he was looking at it with that wall in view.
Mr. WOOD: Just to see how close it was; that was all but why he was anxious to see how close he has not touched upon.

642 The COURT: You have not asked him that.

Mr. WOOD: No; but in that way I wanted to bring out his mental attitude as bearing upon the attention which he gave it.

The COURT: I will sustain the objection.

Mr. FIELD: I object to the continual colloquy between plaintiff's counsel and the Court, which I think is very prejudicial to the rights of the defendants and I want the record to show my objection.

The COURT: Nobody seems to object.

Q. Mr. LaDriere you said that this wall was nine inches out of plumb; when did you measure it?

A. After it fell down I measured the part remaining up.

Q. You never measured the part that fell down to see whether that was nine inches out of plumb, or any inches out of plumb, did you?

A. I had no occasion to.

Q. You had no occasion to: Now would you undertake to swear that the remaining portion of that wall that stood was identically the same in the leaning as that part of the wall which fell?

A. It might have——

Q. No; no; not what might——

A. Well, then it apparently stayed exactly as it was, if that will satisfy you better.

Q. Why do you smile: Do you think that was a good
643 answer?

Mr. FIELD: I object to it as not proper cross-examination.

Mr. WOOD: I think it is, but I will withdraw it.

Q. Mr. LaDriere will you say on your oath to this jury that the wall—that you know that the wall which fell leaned nine inches to the west before it fell?

Mr. MANN: Objected to as an improper question, because the witness is answering all these questions under oath, and the form of the question is objectionable.

The COURT: Overruled.

Mr. MANN: Exception.

A. I am willing to swear to the best of my ability that wall was exactly as it was before the other part fell down—to the best of my belief.

Q. Did you understand me to ask your belief, Mr. LaDriere?

A. I believe I did; yes.

Q. What is that?

A. I believe I did.

Q. I beg your pardon: you misunderstood me: I am asking you what you know: Now what do you know about how much that wall that fell slanted or leaned before it fell?

A. I know—I do not know that it moved any.

Q. You didn't know that it was not out of plumb there, did you, of your own knowledge?

644 A. Yes; I do: It was.

Q. Well then will you kindly tell us when you measured it, and how you determined that it was out of plumb?

A. I had a workman climb to the top of it and extend a projection from the wall—at the end of which he dropped a plumb ball with a

line and the plumb ball was allowed to go down low enough to reach the foundation at the intersection of the foundation and wall at the bottom; then we took a rule divided in inches and measured from top of the wall and the line at the stick.

Q. When did you do all that?

A. I think it was the day after it fell.

Q. Did you set it up again?

A. Set up what?

Q. The wall?

A. Set up the wall that fell?

Q. Yes?

A. No.

Q. Now you knew all the time that I was asking you about the wall that fell?

A. No: you asked me how I measured the wall.

Q. That fell?

A. Before it fell.

Q. The wall that fell: the wall before it fell: you knew just what I wanted?

A. No, sir.

Q. You know it now: Mr. LaDriere, will you tell us now how you measured that wall which fell, and when?

A. I never measured the wall that fell and I did not testify
645 that I measured it before it fell: I testified that I measured the part that stood up, after the other part fell.

Q. And you are willing to say that it is your firm belief that the wrenching of that building incident to the fall of half of that wall did not affect or in any way move the remaining portion of the wall which didn't fall, are you?

A. Yes, sir.

Q. Now you say that reaching along the Ruppe wall, from this excavation at the front corner, there was a ledge of dirt three feet in width, extending from that point clear back to where it approached the surface of the ground as it was originally, do you?

A. Something like that.

Q. Is your recollection clear as to the width of that ledge?

A. It is in this way, that I—when I last saw it felt satisfied that there was no danger of anything rolling down—I did not measure it.

Q. Three feet is not the danger line, in your mind, between what will roll down and what won't, is it?

A. No, sir.

Q. It might have been half of that, or even less, at the top, might it not, this ledge that you speak of?

A. At the very top it might have been, yes, sir.

Q. But you are sure there was a ledge of some appreciable width all the way along on the side of the wall back from this excavation at the corner?

A. I am sure there was the last time I saw it.

646 Q. And that was about two o'clock on the day that it fell?

A. About two o'clock; yes, sir.

Q. Now, you have testified concerning the wall which was removed; the wall which originally stood on lot number one——

Mr. Woon: Withdrawn.

Q. You have a great deal of interest in this lawsuit, have you not Mr. LaDriere?

A. I have not got a cent at stake about it.

Q. You have a great deal of interest in the outcome, have you not?

A. I have a great deal of interest to establish a line of truth about it, if possible.

Q. Have you any interest based upon the fact that if that work fell because of its having been improperly done, it would reflect upon you as an architect?

A. No, sir.

Q. None whatever?

A. Too late.

Q. Now, if I understand you right, you told us that if these upper joists running from wall to wall of the building projected through, or nearly through the wall, that a line of nine inches out of plumb would not make any appreciable difference, didn't you?

A. Not to a great extent: no, sir.

Q. You said that the portions of the wall over this excavation at the front, as it lay—as it fell, slid down into the excavation: now, you don't know whether it slid or tumbled, do you?

647 A. I might have testified saying, sliding: however, I did not see it fall: It was in there when I found it.

Q. During the time that you had these conversations with Ruppe, prior to the fall of the wall, will you say that you did not say to him in words and in substance—or in substance during those conversations, this Frenchman—yourself—knows his business?

A. I say I have no recollection of it.

Q. Well, you would not deny positively that you said that to him, would you, Mr. LaDriere?

A. I might have said it, but I said I do not remember.

Q. You would not say to him that this Frenchman does not know his business, would you, Mr. LaDriere?

A. It would not be policy.

Q. Now, Mr. LaDriere, you say that he did say to you about that time in words or substance; I just as well sell my stock all at once to Barnett as to sell it to other people: He said that, didn't he?

A. Yes, sir.

Q. And you cannot rack your head hard enough to think what kind of conversation or what subject of conversation led up to that remark by him, can you?

A. Why, just I am telling you that we spoke of the foundation—the nature of the work.

Q. Yes; well what characteristic of the foundation were you discussing?

A. We spoke of—in speaking of the foundation—thrust
648 up that wall—we certainly didn't mention any chimney work—we certainly spoke of that foundation, but whether

I said one section, or five section- or no section at all I do not remember; I know the conversation was to the effect of doing that work under the wall.

Q. What was the characteristic of the wall that you were talking about; that it was a pretty well, or a nice wall, or the material that it was being built of: what was it?

A. There was no comment on the wall whatever.

Q. None whatever?

A. No, sir.

Q. Did you have any idea whatever what led him to make that remark—of what led him to make that remark to you?

A. Yes; I did have an idea.

Q. Don't you know that he was complaining of the danger to him and to his building, by your digging up there as you were, and you were assuring him that it was perfectly safe, and was not that the subject matter of your discussion which led up to that remark?

A. I do not remember him finding any fault whatever: However the conversation was in that direction; that he wanted to know how this thing would be done and how that thing would be done in order to be safe: the conversation was on those lines entirely.

Q. And you were assuring him that it was safe and would be safe; weren't you?

A. I presume so.

Q. And in that connection you were telling him that you knew your business and you would see that it was safe, or that in substance, didn't you?

A. I do not remember whether my competency came into question or not, but I know that we parted friends.

Q. You didn't fight—and was not his remark that he would just as soon sell the whole thing to Barnett, as you say he stated in effect, and didn't you understand it in connection with his doubt that the work was safe—as far as he expressed it to you in that conversation, that you were likely to throw his building down?

A. Conscientiously, I took it as a joke.

Q. How is that?

A. I took it as a joke.

Q. You took it as a joke?

A. Yes, because the gentleman and I have been joking together.

Q. Well, you knew that that remark had in mind the possible throwing down of his building by your excavation didn't you; that it referred to that?

A. Well, it would point that way.

Q. Yes: But you had no fear of that, and you told him that you had no fear of it, didn't you?

A. I had no fear whatever.

Q. And you told him so, didn't you, in that conversation?

A. I presume so: I do not know as I did.

Q. He had known you as an architect and builder for some years, and you had known him, had you not?

A. I do not know how long Mr. Ruppe did know me.

Q. How long had you known him?

A. Oh, about a year or a year and a half.

Q. Did you tell us whether the entire wall on lot number one remained—the wall of that old building, was removed before you commenced excavating on that lot?

A. Yes; if I remember right it was.

Q. Do you remember hearing Mr. Thompson testify that he went to California after removing that wall, and went to California on the first of June: Do you recollect that?

A. I do not remember any points of his testimony to speak of.

Q. You recollect the circumstance of his going to California at that time?

Mr. FIELD: I do not think this is proper cross-examination of this witness: The jury will remember what Mr. Thompson said.

The COURT: Overruled.

Mr. FIELD: Exception.

A. Yes; I remember Mr. Thompson going to California.

Q. Do you recollect that he had completed the removal of this wall before he went?

A. I am not quite sure: I know he sold some of those stones to another party and he had hauled them off—if I remember
651 right I think he went before all the stones were taken away—meaning the footing stones.

Q. Foundation stones——

A. However, I am not positive whether he had them all away or not.

Q. Do you know how long before that the adobes had been removed, before the foundation of that building on lot number one?

A. No; I could not tell you how long.

Q. Give me your best recollection?

A. Oh, possibly a week or a week and a half.

Mr. WOOD: That is all.

Redirect examination by Mr. FIELD:

Q. Mr. La Driere, just what did Mr. Ruppe say to you in that conversation which indicated to you that he was apprehensive that the excavation going on there might throw down the wall of his building?

Mr. WOOD: I object to that, first, because the whole subject was thoroughly gone over by counsel on direct examination and there is no apparent reason for re-opening it; and second, it calls for his conclusion; the question is involved.

The COURT: Overruled.

A. I do not remember the substance of our conversation; that is, I could not give you any of the definite points in it, only I knew it was in regard to that foundation and the supporting of his wall.

Q. Is what you have said about his having been appre-
652 hensive that the work would throw down his wall, your present recollection of the effect of his conversation produced on you, or your present recollection of what he said?

Mr. WOOD: The same objection and it is cross-examination of his own witness in addition.

The COURT: Overruled.

A. I did not catch the meaning, Mr. Field.

The COURT: Read the question.

Q. (Repeated.)

A. You understand that I had testified that I had said that he was insinuating anything—any fear, when he was not—he was simply asking me questions about it—not that I remember of—everything was very amicable—there was no——

Q. Well, Mr. La Driere, I understood you to say on the cross-examination, that your construction of the conversation between you and Mr. Ruppe at that time was that Mr. Ruppe was getting apprehensive there that the work was going to throw down the wall, and was wanting assurance that it would not, and that you gave it to him; is that a fact?

Mr. WOOD: Same objection——

A. No, sir; not in that sense.

Mr. FIELD: That is all.

653 ED. STEINER, recalled for further cross-examination by the plaintiffs, testified as follows:

Cross-examined by Mr. WOOD:

Q. Mr. Steiner you were a witness on the trial of this case which was tried here last December, were you not?

A. Yes, sir.

Q. On that trial were you not asked upon direct examination this question:—concerning this wall of the Ruppe building which fell:—'Question: Now describe the condition of that foundation when you commenced to remove it;' and did you not answer: 'the foundation was all right when I—except of about ten feet in the front, about forty or fifty feet back.' Question: 'What do you mean by being all right,' and did you not answer, 'It was in place in the trench.' Were you asked those questions and did you give those answers?

A. I gave them answers only I do not understand that eight or ten feet from the front—that is all that I—I answered the others I think—I must have misunderstood that.

Q. Why, you were not asked in those questions, or in either of them, about eight or ten feet: you stated that yourself in answer to the question, did you not?

Mr. FIELD: I object to that: It is for the witness to say what he understood; not counsel.

The COURT: Overruled.

Mr. FIELD: Exception.

654 A. I must have said it, I suppose.

Q. Well, do you recollect whether you did or not?

A. I do not remember.

Q. Well, was it true——

Mr. FIELD: Objected to.

Mr. WOOD: Withdrawn.

Q. Was there eight or ten feet of the front under—of that foundation missing?

Mr. FIELD: I do not object to that.

A. I do not know whether it was or not: I do not think so.

Mr. WOOD: That is all.

Mr. FIELD: No questions.

EUGENE W. BALTES, introduced as a witness in behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. FIELD:

Q. What is your name?

A. Eugene W. Baltes.

Q. Are you the same Eugene W. Baltes who testified on the first trial of this case as a witness for the plaintiff?

A. I am.

Q. Do you know Bernard Ruppe?

A. I do.

655 Q. How long have you known him?

A. Since May, 1902.

Q. Did you have any business relations with him in the year 1902, and if so what were they?

A. Yes, sir; I was employed by Mr. Ruppe in his drug store.

Q. In what capacity?

A. Prescription clerk.

Q. How long were you employed by Mr. Ruppe?

A. Well, at different intervals I was employed by Mr. Ruppe to work as night clerk until the store fell down; then I went to work as day clerk, until the fair of that year, or fall of that year, I think it was.

Q. Well, now, I wish you to state Doctor whether or not you were in his employ at the time it fell, and how long you had been in his employ before that time?

A. Well, I was in his employ at the time the building fell—that is when I first went to work for Mr. Ruppe.

Q. And how long before the building fell had you been in his employ?

A. I should judge about a month—may be six weeks—something like that.

Q. Now were you in his employ after he moved into the Grant building?

A. Yes.

Q. For how long?

A. Until the fair that fall—until the fair came on.

Q. Were you in his employ after he moved in the Armijo

656 building, Doctor?

A. Yes, sir.

Q. For how long?
A. Until April of that year. That was the following year, I think—1903.
Q. State whether or not during the time that you were in the employ of Mr. Ruppe, as you have stated, you ever saw the book marked plaintiffs' exhibit L (exhibiting book to witness)?
A. (Witness examining book.) I never saw that book when I was in his employ.
Q. State whether or not that book was kept as a part of the system of books kept in Mr. Ruppe's store during the time that you were in his employ?

Mr. Wood: We object to that as calling for this witness' conclusion and as incompetent, suggestive and leading.
The Court: Overruled.
Mr. Wood: We except.

A. Not to my knowledge.
Q. Can you pick out of this pile of books here, Doctor Baltes, the books that were kept in Mr. Ruppe's store, to your knowledge, during the time that you were in his employ: if you can, do so: (counsel referring the witness to all the other book exhibits).
A. This——
Q. Do you mean to say this is one of the books that was kept there, Doctor?
657 A. Yes.

Mr. Field: Witness identifying book—Day Book, plaintiffs' exhibit N; May 14, 1902, to December 1902.

A. This is one of the books also.

Mr. Field: Identifying book Dec. 27, 1902, to July 7, 1903.

Q. What do you say about the large book—referring to exhibit O-1.
A. The large book, the ledger—I do not remember ever seeing this book (referring to book marked plaintiffs exhibit O-1). This book here is a book which was in use there before I came to work for Mr. Ruppe.
Q. What books were kept there while you were in the employ of Mr. Ruppe, in addition to the two books which you have pointed out there, if any?
A. Well, we had a book similar to this book.

Witness referring to large ledger, exhibit O-1.

Q. State whether or not there was a soda water book kept there?

Mr. Wood: We object to this witness being led: and that is a leading question.
The Court: Overruled.

A. I would not say positive—there was an expense account kept at the soda fountain in a book.
Q. Can you say whether or not this is the book in which the expense account is kept?

658 Mr. Wood: We object to the question as leading and suggestive and because the counsel has shown the witness this book with the other set of books and asked him if he could identify any of the books that were used there and the witness has in the presence of the Court examined each of the books and was unable to recognize this book as any part of the set kept there; and therefore this is grossly leading and suggestive, to have counsel pick it out.

The Court: Objection sustained.

Mr. Field: Exception.

Q. Examine the book which you have in your hand and state whether or not you ever saw it before, and if so when and where? (Witness having in his hand Soda Water Book, plaintiffs' exhibit M.)

A. I do not remember of ever——

Q. What did you say?

A. I do not remember of ever seeing this book before. (Referring to plaintiffs' exhibit M.)

Q. State, Doctor Baltes, whether or not at any time while you were in the employ of Mr. Ruppe any inventory of the stock of merchandise contained in that store was taken—I mean prior to the fall of the wall in the Weinman building?

A. Not to my knowledge; no, sir.

Q. State whether or not you ever assisted in taking such an inventory?

A. No, sir; I did not.

659 Q. State whether or not you ever saw a book in that store which contained an inventory, or purported to contain an inventory of the stock of goods, taken prior to the fall of this building?

A. No, sir.

Q. State whether or not you ever saw—assisted Mr. Ruppe in making up that list of goods that were destroyed in the wreck of the building?

A. No, sir; I did not.

Q. State whether or not you ever saw a book in Mr. Ruppe's possession while you were with him in which such a list was made?

A. No, sir; I did not see any such book.

Q. State whether or not you ever assisted Mr. Ruppe in fixing the price of the articles which were enumerated in the bill of particulars in this case?

A. I did not assist Mr. Ruppe.

Cross-examined by Mr. Wood:

Q. Doctor Baltes, what were your duties when you were working for Mr. Ruppe?

A. Why, drug clerk.

Q. Drug clerk?

A. Prescription clerk.

Q. Why, sure, he was in the drug business: but what were your duties: what did you do?

A. Waited on the trade and do whatever Mr. Ruppe told me.
Q. Did you keep books?
A. Yes, sir.
Q. Have entire charge of his books, while you were there, did you?
A. No, sir.
Q. Will you kindly tell us just what you did in the way
660 of keeping books?
A. The charges would be made on the—call this book a blotter if you wish; then on the large book, in the morning—and transfer them from this book to the other. (Witness referring to certain books.)
Q. Well, who did the transferring?
A. I did part of it.
Q. How much time did you spend in keeping books while you were there?
A. That would depend upon the time that I was in the employ of Mr. Ruppe?
Q. What part of your time were you engaged in keeping books?
A. Do you mean how many hours?
Q. Answer it in any way you see fit.
A. Well, in the morning I transferred the charges from this book to the big book; sometimes that book took half an hour; sometimes an hour and a half, and sometimes two hours—whatever time it took to transfer them over.
Q. That is when you were working nights?
A. No, sir.
Q. Who was working there at the same time that you were taking care of these books?
A. Mr. Mallette.
Q. Do you know Mr. Mallette's handwriting?
A. I would not swear to it, no.
Q. Could you recognize it if you saw it in this big ledger—(referring to exhibit O-1)? Would you recognize it if you saw it in that big ledger?
A. No, sir.
Q. Now, out of all these books that have been produced
661 you have been able only to identify two that were used in Mr. Ruppe's business at that time, have you not?
A. Yes, sir.
Q. And how do you happen to identify those—by what marks—what marks do they contain?
A. I saw my own handwriting.
Q. And if by a more careful search in these other books you should find some of your own handwriting in them, then you would identify them as having been used during the time you were there?

Mr. FIELD: Objected to as not proper cross-examination.
The COURT: I will sustain the objection until it appears whether anything is found: It is something which may tend to confuse the jury.
Mr. WOOD: I will pass it.

Q. The fact is you can only recognize books as having been used there at that time if you find upon looking through them that they contain your handwriting, and that is the only way you have of recognizing them?

A. I recognize my own handwriting.

Q. And that is the only way that you have of remembering whether a book was there at that time—that it contains your handwriting is it not?

A. Yes, sir.

Q. So that if a book was produced that you had nothing to do with keeping, you would not undertake to say whether that book
662 was kept there at that time, or not, would you?

Mr. FIELD: Objected to as not proper cross-examination; argumentative and not calling for any fact.

The COURT: Overruled.

Mr. FIELD: Exception.

A. I would not.

Q. Now, this cash book, exhibit L, that you have examined: do you know whose writing it is in that book: look it through and see if you can tell us?

A. It looks like Mr. Ruppe's but I would not swear to it.

Q. You have seen Mr. Ruppe's writing, and you frequently saw him write while you were there in his place, did you not?

A. Yes, sir.

Q. But you would not undertake to say whether or not the writing in this cash book, exhibit L is his, or not, or whose it is?

A. It looks like his.

Q. Now, you don't mean to tell this jury that Ruppe didn't keep this book himself and keep it in his desk during all the time that you were there, do you?

Mr. FIELD: Objected to as not proper cross-examination, and as argumentative: It is for the jury to tell what the witness means.

The COURT: Overruled.

663 Mr. FIELD: Exception.

A. Why I think that Mr. Ruppe did keep the book: it is his handwriting.

Mr. FIELD: I move to strike out the answer of the witness as not responsive to the question; as mere expression of opinion and not proper to go to the jury.

The COURT: Overruled.

Mr. FIELD: Exception.

Q. Before the fall of the wall you were working nights, weren't you Doctor?

A. Yes, sir.

Q. Now, doctor, you say that you had charge of keeping these books, in part?

A. I did.

Q. Did you have any charge of it while you were in the Weinman building and before the wall fell?

A. No, sir.

Q. And you were not able to identify any of the books that were used in the Weinman building before the wall fell unless, perchance, a day book, were you?

A. It might be possible that even in the Weinman building that I made some entries in that large book there—it might be possible.

Q. But you have no recollection of ever having seen that large book before, have you?

A. Well, I saw one very similar to it.

664 Q. But you don't know whether it was that or some other book and you cannot tell us after you have looked at it again, can you?

A. I cannot tell—if I could find my handwriting in the book, then I could tell it.

Q. Well, Doctor, can you tell us about how much time you spent in examining these books in order to be able to tell us whether or not you saw them while in Mr. Ruppe's employ: how much time did you spend looking them over to determine this question?

A. You mean to identify the books?

Q. Here, now?

A. Just what time I put in here.

Q. And did you not spend about fifteen minutes in looking over those books in order to tell whether or not you ever had seen them before?

A. I might have spent fifteen minutes: I did not keep any account of the time.

Q. But after that you are unable to tell us whether you saw—ever saw any of those books before, save the two day books in which you have found your handwriting?

A. Well, I identified those two—and the others——

Q. And save for those, you do not know whether you ever saw any of the others before?

A. No; I do not.

Q. Look upon page 689 of this book—this big ledger, and see if you recognize any of the writing on that page?

A. Yes.

Q. Is that your writing?

665 A. Yes, sir.

Q. Do you now recognize that big ledger as one of the books that was used in his drug store while you were there?

A. Yes, sir.

Q. You have not any doubt about it now—about that big ledger?

A. That is my handwriting: No.

Mr. Wood: That is referring to ledger exhibit O-1.

Q. Now, Doctor, you say you didn't help Mr. Ruppe in making up the list of the property destroyed in that book: Did you mean to say that?

A. Not to my knowledge, Mr. Wood: I do not remember of having helped.

Q. Do you recollect that after moving from the building that fell into the Grant block, or building, Mr. Ruppe coming to you and to the other clerks in your presence and discussing with you whether or not certain articles had been in the store just before the wreck, and whether or not you had sold them?

A. I do not remember that conversation.

Q. Don't you remember his inquiring of you and the other clerks as to whether certain articles were there before the wreck?

A. No, sir, I do not.

Q. Now Doctor you testified upon this last trial here—last fall, did you not?

A. Yes, sir.

Q. And upon that trial were you not asked this question and did you not give the answers, as I will read them: "Question:

666 Now did you say that you never assisted Mr. Ruppe after that wall fell in an endeavor to find out what has been destroyed? Answer: Why, yes, I did. Question: You did assist him in endeavoring to find out what had been destroyed? Answer: Yes, sir. Question: And he inquired of you whether you remembered such and such articles being there at the time that the wall fell, didn't he? Answer: Yes, sir."——

A. Well, what were the articles——

Q. Where you asked those questions and did you not give those answers when you testified here at the former trial?

A. I do not remember.

Q. Have you not any recollection of that?

A. I have of the former trial, yes, sir.

Q. You have recollection that you did give these answers at the former trial?

A. No, sir; I have not any recollection of giving those answers.

Q. Will you say that you did not give those answers to these questions at the former trial, Doctor?

A. No, sir; I will not.

Q. Has your recollection been changed in any manner since the former trial, as to the facts?

A. Not at all.

Q. Is it as clear now as it was then?

A. I think so.

Q. Well, what do you say now as to whether or not you did assist him in the manner indicated by those questions and answers?

A. Assisted him in making up an inventory?

667 Q. In determining what property had been lost, Doctor, and destroyed?

A. Well, I cannot just state about as far as that is concerned.

Q. And were you not further in the same trial asked this question: 'Question: And you heard him making those inquiries of other clerks, didn't you?' and you answered, 'Yes, sir,' and then you were further asked, 'And he inquired of you whether in that period of time, just before the wall fell, you had sold certain articles, that you both recollected, remembered to have been there formerly, did he not' and you answered——

A. Before the fall of the wall?

Q. 'Yes—and did you not answer that question in this manner: Why he inquired of me if anything was missing—had you sold it—or do you remember selling it, or something of that kind—yes, sir.' Was not that your answer on the last trial?

A. I would not swear to it, no, sir: I do not know whether it was or not.

Q. Now, will you say that you did not so testify upon the former trial?

A. No, sir; I would not.

Q. If you did so testify was that testimony true?

Mr. FIELD: I object to that as not a proper question: That is for the jury to say, and not the witness.

The COURT: Overruled.

668 Mr. FIELD: Exception.

A. I testified to the best of my ability.

Q. Is your recollection or belief any different now from what it was last December when you testified before?

A. No, sir.

Mr. WOOD: I desire to offer as part of the cross-examination of the witness the record of his testimony as I have read it here, and to establish it by the stenographer.

Mr. FIELD: To which we object: When he comes to rebuttal we can consider this.

Q. Doctor, have you talked to anybody representing the defense here since you testified before, about this case?

A. No, sir.

Q. Did you talk with any of them about your testimony before you came in here today?

A. No, sir.

Q. Did you read your testimony over that you had given on any former trial?

A. Yes, sir.

Q. Well, you omitted to read that that you gave upon the last trial, didn't you?

A. Yes, sir.

Q. You didn't see that: Now, Doctor, again I want to ask you, is it not true that after Mr. Ruppe had removed the stock to the Weinman building—I mean from the Weinman building to the Grant building—is it not true that he inquired of you from
669 time to time whether you remembered such and such articles as having been there at the time that the wall fell?

A. As having been in the old place?

Q. Yes?

A. I do not remember whether he did or not: probably he did.

Q. And didn't you hear him at about the same time making similar inquiries of the other clerks there?

A. I do not remember, sir; not now.

Q. Well, if you testified that he did on the former trial it was true, was it not?

Mr. FIELD: Objected to as not proper cross-examination: It asks the witness to usurp the functions of the jury.
The COURT: Overruled.
Mr. FIELD: Exception.

A. At the former trial I answered the questions as truthfully as I could.
Q. I did not ask you that: I would like to have you say Doctor whether or not, if you did so testify upon the former trial, when perchance your recollection was better—was it true?

Mr. FIELD: We make the same objection.
The COURT: Overruled.
Mr. FIELD: Exception.

A. I do not remember.
670 Q. You don't remember what? Whether it was true or not?
A. On the former trial I do not remember just what I answered—on the former trial.
Q. Well, Doctor, I did not ask you if you remembered what you testified on the former trial: I asked you if you did testify to that upon the former trial when perchance your recollection was better than it is now, was your testimony then true?
A. Yes, sir.

Mr. FIELD: I wish to object to that——
The COURT: Overruled.
Mr. FIELD: I will state the grounds: I object upon the ground that the witness has already answered this question before, and that he didn't remember his testimony on the former trial, and that the question is not proper cross-examination, because it calls upon the witness to usurp the function of the jury.
The COURT: Objection overruled.
Mr. FIELD: Exception.

Redirect examination by Mr. FIELD:

Q. Doctor Baltes, you said in answer to a question by counsel that you thought that Mr. Ruppe did keep this book: Why did you think so?

671 Mr. WOOD: Objected to as cross-examination of his own witness.
The COURT: Overruled.
A. It contains his handwriting.
Q. You do not undertake to say when it was kept by Mr. Ruppe or where it was kept?

Mr. WOOD: The same objection.
The COURT: Overruled.

A. No, sir.
Q. State whether or not it is your recollection that you ever saw this book in Mr. Ruppe's store while you were there in his employ?
A. Not to my knowledge; no, sir; I never saw it.
Q. Now state whether or not there was any other book that you do remember to have seen there that is not here?
A. Yes, sir.
Q. What kind of a book was that: describe it?
A. It looks like this book here—just exactly such a book as that (referring to exhibit O-1).
Q. Were you or not asked on this trial anything about the matters with reference to which Mr. Wood asked you about your testimony on the last trial?

Mr. WOOD: I object to that as asking this witness about the *the* record of this case—and as asking the witness to conclude what he has testified on this trial, all of which is a matter of record
672 here.

The COURT: Sustained.

Mr. FIELD: I except and offer to show by the witness that he was not asked on this trial in any of the questions referred to by Mr. Wood, as to his testimony on the former trial, and we except to the refusal of the Court to permit us to do so.

Recross-examination by Mr. WOOD:

Q. How many big ledgers like the one there, did Mr. Ruppe have in his place while you were working for him?
A. Two.
Q. He had two, did he?
A. Yes, sir.
Q. Are you sure that is all he had?
A. That is all I ever saw.
Q. Was he keeping those both together, at the same time?
A. No, sir.
Q. He was not: when did he commence the second one that you saw there?
A. I do not know where—I have no knowledge.
Q. Was it before the wall fell that he had both of them there?
A. There was two books in the old store.
Q. Two big ledgers like the one that you have been able at last to recognize?
A. As near as I can remember, about that size.
Q. How did he separate the accounts which he kept in each?
A. One book was not used at all.
Q. One was an old book—not used at all: that is the idea?
673 A. Yes.
Q. Well, this was the book that was used, ledger O, which is here?
A. That is, as far as I know.
Q. And the other one you have in mind, is an older book than this?

A. It is an old book—I know nothing about it—just stood in under——

Q. Doctor, let us get down finally then, to see if we understand each other: This ledger exhibit O-1, is the only big ledger that was being used during that period of time?

A. Yes, sir.

Q. And you are unable to say that you ever saw then this book which has been called the Soda Water book, as I understand you—exhibit M?

A. Yes—I would not swear that I saw that before unless I could find some of my handwriting in it.

Mr. Wood: That is all.

Mr. Field: That is all.

Caesar Grande, a witness introduced in behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. Mann:

Q. What is your name?

A. Caesar Antonio Grande.

Q. You have testified before in this case, at different times?

674 A. Yes, sir.

Q. Do you know the parties to this suit?

A. Yes, sir.

Q. Mr. Ruppe, Mr. Di Palma, Mr. Barnett and Mr. Weinman?

A. Yes, sir; I know them.

Q. How long have you resided in Albuquerque, Mr. Grande?

A. Twenty-seven years.

Q. Were you here in the summer and spring of 1902?

A. Yes, sir.

Q. Do you know the location of lots one and two, in block 16 of the Original Townsite of Albuquerque?

A. Yes, sir.

Q. Do you know what buildings were upon those lots in the spring—or in the month of May, 1902?

A. Yes, sir.

Q. Describe to the jury what buildings were on those lots, one and two, prior to the time that the Ruppe wall fell?

(Witness speaking very broken English.)

A. Two adobe houses.

Q. And can you give the jury any idea of the size of those buildings?

A. Well, it was both houses was adobe and Talbot's building, that was brick on the corner of the alley—the rest was adobe in front.

Q. And on which lot was the brick building?

A. On the corner—southwest corner.

Q. Southwest corner of which lot?
675 A. On first lot; number one.
Q. Now, what became of those buildings that were on lot one, if you know?
A. Mr. Barnett destroyed the building.
Q. Do you know about what time they took down the buildings on lot one?
A. The first part of June, it was.
Q. Now, what was then done on lot one, after that building was removed, or those buildings?
A. We start to make an excavation for Barnett building.
Q. Who was doing that excavation for Barnett?
A. I did.
Q. How were you doing it, by contract, or otherwise?
A. By contract.
Q. How long after the buildings on lot one was removed before you commenced excavating under your contract?
A. Right after we got through with it.
Q. Do you know about when that was; about what month?
A. It was in the first part of June—I do not remember the day.
Q. Now, when the buildings were torn down and removed from lot one, did you observe the building on lot number two?
A. Yes, sir.
Q. And the condition of the east wall of that building?
A. Yes, sir.
Q. Describe to the jury what the condition of the east
676 wall of that building on lot two was at the time you commenced excavating on lot one?
A. The wall was all crooked and had a crack—two crack—one about forty feet away from the corner and the back one was about fifty feet back.
Q. Describe that last crack you mention, the back one, to the jury?
A. The one about forty-five or fifty feet back was a pretty good size crack; the other one was a little bit crack—it was not so big—not so deep—it was a crack all right—but not so wide like the other one.
Q. Describe that crack as to whether or not it ran up and down with the wall, or lengthwise with the wall?
A. It was from up down—kind of zig-zag and not straight—plumb (indicating by motion of hand).
Q. Now, when you say the wall was crooked, do you mean it was crooked horizontally, up and down, or do you mean it was crooked the other way?
A. It was crooked right in the middle—it was out plumb.
Q. Describe to the jury what you mean by that Mr. Grande?
A. If you give me a piece of paper I can explain it to the jury. If a wall is straight, plumb, like this—it had a belly in the middle like this—see (demonstrating by bending a piece of paper). It was about from the plumb—from the roof down—was about nine

inch from the top to the floor—wall was twenty-two inch out of plumb, I know—but from the plumb to—level of the joists
677 was about nine inch.

Q. When did you plumb the wall?

A. Before they start to build—before they start the excavation.

Q. Was it before or after the portion of the wall fell?

A. Before the wall——

Q. Now I ask you to tell the jury, Mr. Grande, to what extent you had excavated on lot one at the time the wall fell?

A. I was start on the eastern—on the southeast corner.

Q. On what corner?

A. On the southeast corner, going to the west—to near Mr. Ruppe.

Q. Well, when did you start with reference to the intersection of Central avenue and Second street?

A. We start about on the corner and most work we done on the south—along the south—along the south.

Q. And how much of the excavation had you completed at the time that a portion of the Ruppe wall fell?

A. It was one-fourth yet—about one-fourth of the job.

Q. About one-fourth of it to be completed, do you mean?

A. Not quite; no, sir.

Q. Now how were they doing that excavation. How were they digging that dirt out?

A. They were digging it out with a team—with the team.
678 Q. Well, with scrapers, with wagons, or how—with carts?

A. No; loaded with wagon and take it out.

Q. And what was the condition of the excavation along the east side of the Ruppe wall and up next to the wall?

A. We keep away from the wall about not less than three feet or five feet all along the wall—we leave a bank there from the top—going to slope down.

Q. State whether or not you were in charge of that work and there on the day that the wall fell?

A. Yes, sir.

Q. What time of the day did you last see that wall before it fell?

A. It was about four o'clock.

Q. And what time, if you know, did the wall fall?

A. About half past four or five o'clock.

Q. Now, I wish you would describe to the jury, Mr. Grande, the exact condition of that excavation at the northeast corner of lot one and next to the Ruppe wall at the time you last saw it?

A. We started from the corner and got down—and we reached—I ran right straight to the corner of Mr. Ruppe and digged down about two feet and a half and plumb—about Mr. Ruppe's building—according to the contract we had to build the piers there either five feet—I started the first piers on the corner, and then I gone under the wall. Mr. La Driere came in and said, don't you go
679 much further——

Mr. Wood: I object to what Mr. LaDriere said to the witness.
Mr. Mann: I did not call for that.

Q. Just state what you did there, and not what Mr. La Driere or anybody else said to you, Mr. Witness?
A. Well, I tried to go on to the corners and start the first piers and then stopped it.
Q. And what time did they stop work there at that corner?
A. Same day.
Q. And what time in the day?
A. Well, about noon; when Mr. La Driere came in and stopped me there he says——
Mr. Wood: Never mind what he said.
Q. Now state whether or not there was any men working there at that corner—directly at that corner during the afternoon of that day?

Mr. Wood: If any part of that conversation with Mr. La Driere got into the record, I move to strike it out.
The Court: It may be stricken out as not responsive.

A. There was working nobody in the corner at that time—the workmen was on the other side, to load the dirt.
Q. Now state what if any other excavations had been started for piers along the Ruppe wall at the time it fell?
680 A. Not at all.
Q. How many men were working there in that excavation on the day that the wall fell?
A. About six men and five teams.
Q. Did you see the wall fall, Mr. Grande?
A. No, sir.
Q. When did you see it after it fell: how long after?
A. Right after it fell.
Q. Do you know where you were when the wall fell?
A. I was in the St. Elmo.
Q. In order to make it clear, I will ask you Mr. Grande, whether or not there were any other excavations started for piers in this belt of earth that you have described along the Ruppe wall other than the one right at the corner?
A. Not at all.
Q. Now when you arrived there after the fall of the wall, describe to the jury what you saw; and just how it appeared to you as you saw it?
A. Well, I know that house had to fall before we started the foundation anyway.
Q. Well, go ahead, Mr. Grande.
A. Because the wall was too crooked and cracked, and cannot stand.

Mr. Wood: The last part of that, because the wall was too crooked and cracked, I ask to have stricken out.
The Court: I think perhaps Mr. Grande did not understand that

it was after the wall fell and not before. The whole answer may be stricken out as not responsive.

681 Q. Now Mr. Grande the question is for you to describe to the jury just what you saw after you got there after the wall had fallen; how it appeared after it had fallen?

A. It fall about fifty feet—something like that.

Q. Well, in what way: Fifty feet in length, or had it fallen fifty feet wide, or how?

A. About fifty feet in length.

Q. Where had the wall broken with reference to the large crack that you have heretofore described?

A. Just right at that crack—that is what stopped the fall.

Q. You say you know Mr. Ruppe?

A. Yes, sir.

Q. Did you know him at that time, Mr. Grande?

A. Yes, sir.

Q. Had you ever had any conversation with Mr. Ruppe about that wall?

A. Yes, sir.

Q. When and where?

A. Well, before they start to work I tell Mr. Ruppe the house going to fall, I think—I think it is better to put partitions inside and hold the joists and take the wall off—be a better job.

Q. What did Mr. Ruppe say to that?

A. Mr. Ruppe say, I do not care whether it fall or not; I am well insured.

Q. Well, was any means taken by Mr. Ruppe or anybody else to protect that wall?

Mr. Wood: I think that calls for his construction and con-
682 clusion as to what was done.

The Court: I do not think you can be very precise with him. He may answer.

A. After I been talking that time to Mr. Ruppe and told him to protect the wall—to take the wall down and put partitions in—after that I never say a word any more to him.

Q. The question was whether Mr. Ruppe or any one else did anything to protect that wall?

The Court: To keep it from falling?

A. No, sir.

Q. How long was that before the wall fell, that you had this conversation with Mr. Ruppe?

A. Same time start—we start the excavation.

The hour of five o'clock P. M. having arrived, an adjournment was here taken until tomorrow morning at 9:30 A. M.

And now, on this 7th day of April, 1910, at 9:30 A. M., pursuant to adjournment, the trial proceeds.

Q. I will ask you to tell the jury Mr. Grande, whether or not after the foundation of the Talbott building, the building on lot one, was

removed, the foundation of the building occupied by Mr. Ruppe was exposed?

A. Some part of it was exposed and some part was—some stone in it yet.

Q. Some stone in what?

A. The Talbott building.

Q. Well, do you mean to say that the stone from the foundation of the Talbott building had not all been removed when the
683 wall fell?

A. No, sir.

Q. How much of the foundation of the Talbott building still remained in place at that time, if any—at the time the wall fell?

A. Don't — was very much—about one-third rock was left there yet.

Q. How close was the foundation of the Talbott building to the Ruppe building?

A. Tight together.

Q. Who was removing the rock, or who had the contract to remove the stone from the foundation of the Talbott building, if you know?

A. I do not remember the name—it was that Jew there—he took it off—he had a contract to take the whole building away—I forget the name.

Q. Do you know a man by the name of Thompson?

A. Yes, sir; that is the one.

Q. Levi R. Thompson: he had the contract?

A. Yes, sir; that is the one.

Q. I will ask you Mr. Grande whether or not you were paid by Barnett in full your contract price for that excavation?

Mr. Wood: Objected to as irrelevant and immaterial.

The Court: Sustained.

Mr. Mann: We offer to prove affirmatively by the witness that he was paid the full amount of his contract price for the excavation, by Mr. Barnett, and that nothing was withheld by Barnett by
684 reason of the fall of the wall and except to the refusal of the Court to permit us to do so.

Mr. Mann: That is all.

Cross-examined by Mr. Wood:

Q. When did you commence your work, excavating on that lot?

A. I do not remember the date; first part of June.

Q. At the time you commenced was all the stone work and adobe work removed from lot one—that is the corner lot?

A. No, sir; was part not gone yet—tight (or tied) with Mr. Ruppe's building.

Q. Now what part of the foundation of the old building on lot number one remained when you commenced work excavating?

A. Was about the middle—the centre of the building there—a spot there about the centre of the building.

Q. Centre of what building: the Ruppe building?

A. Yes, sir.

Q. How far back from the sidewalk on Central avenue was it before there was any foundation at all of the old building remaining?

A. I cannot exactly say how many feet, but was good many stone along there.

Q. Well, you thought about half way back through the Ruppe building before it commenced, did you?

A. No.

Q. Well, you said along toward the middle of the Ruppe
685 building: Where did you mean?

A. About the middle of the lots—we had some part left—one piece there—one piece there left on there—I noticed one bunch.

Q. Just loose stone left along in there; that is what you mean?

A. No, sir; was the old foundation yet.

Q. You say a piece here and a piece there: can you not explain more particularly how they laid and how much of the foundation was remaining there, and where it was?

A. Was different kind of stone there—were some good stone—good pieces of rock—dimension stone taken out—some was rough rock—rough rock left over—there scattered all along the wall.

Q. What was it left for—if you know: Why was it left?

A. Because it didn't pay to take it out; kind of rough stone and Thompson—I do not believe he had no business to take it—he left it there—he didn't pay him to take it out.

Q. He left it there because they were pieces of stone that were of no value and that could be carted out with the dirt when you took the dirt out: that is the idea?

A. Yes, sir.

Q. Now, for the most part, all of the stone that was of any value had been taken out of that foundation and removed at the time you went there to dig, was it?

A. On the alley side that was the stone—best stone, on the south—the southeast and the southwest to the corner—the alley.

686 Q. Well, now, from the front, along that portion of the Ruppe wall which fell that stone had practically all been taken away, save the pieces that were of no value, when you commenced there, had it not?

A. Yes.

Q. That is, the entire foundation had been thrown down—they had taken away whatever of stone was of value and the rest was left there scattered along where they had taken it out: that was the condition, was it?

A. Yes, sir.

Q. When was it that you saw the two foundations right up against each other in that front part of the Ruppe wall?

A. At the time they start to destroy the building.

Q. What did you have to do with destroying the building?

A. Nothing at all.

Q. Nothing at all?

A. No, sir.

Q. That was entirely done before you commenced your work at all, was it not?
A. Yes, sir.
Q. Did you measure the distance between those two walls at the time?
A. They was tight together; there was no distance at all.
Q. Don't you know that Mr. Ross measured right through between those two buildings?

Mr. MANN: Objected to as not proper cross-examination,
687 and for the further reason that Mr. Ross testified he did not measure between them and he could not.

Mr. WOOD: The answer is to that that the buildings were apart in front some three or four inches and came together at the rear end: I am asking the witness if he does not know that fact.
The COURT: Objection sustained.

Q. How did you happen to measure the distance, or know the distance—or notice the distance between those two walls—what were you doing there: How were you interested in that situation before the wall fell?
A. I did not measure them at all; was tight together; I cannot measure it—they both tight together.
Q. You could not even put a knife blade between them in the front, could you?
A. No, sir.
Q. Not even a knife blade?
A. No, sir; they were tight together.
Q. All the way up—from the top to the bottom of the adobe, was it not?
A. The adobe on top, I do not know; I took that foundation, that is all I know.
Q. You don't know a thing about any part of the adobe wall above the foundation; whether they came together or not?
A. I took the job myself, and I want to do the work: it was not there any more; the adobe was gone.

Q. What I asked you was whether you knew a thing about
688 whether the adobe walls touched each other above the foundation, on any part of that lot?

A. I do not know: The adobe wall, I did not look at it; I do not know.
Q. You do not know: Well, was the adobe wall on there when you looked to see that the foundations touched?
A. No, sir.
Q. The adobe wall was all off?
A. The adobe gone and brick.
Q. Do you know when it was that you made that inspection to see that the walls touched?
A. When I got the job, I seen that there was a piece of wall there yet; tight together.
Q. Well, when was it, before or after you commenced excavating?
A. At the time I got the contract.

Q. Well, you commenced excavating immediately after you got the contract, didn't you?

A. Say about a week yet—few days anyway—I do not remember exactly.

Q. Do you know whether it was a single day that you waited—a single day after you got the contract, before you commenced?

A. I waited a few days; it is not very long.

Q. Will you swear that you didn't commence work on that contract on that excavation on the very day or the following day after you signed the contract?

A. After I get the contract I have to get the bonds—it takes a couple of days before I give the bonds.

689 Q. Now, can we not get a little closer to it: Will you say that you didn't begin that contract—begin the work on the contract, at least as soon as the day that you signed it?

A. No, sir.

Q. You will not say so?

A. No, sir.

Q. Was Mr. Thompson working on that job when you signed your contract, or had he finished?

A. He was near done—he got a few pieces left there yet—regular dimension stone.

Q. When you signed the contract: He was gone to California before you signed the contract, was he not?

A. I do not know if he was gone.

Q. You do not know where he was?

A. No.

Q. You do know that he was not working there and that he had finished his work, don't you?

A. I think he through (or threw) his job; left some rock there and Mr. Strong take it away.

Q. You say it was the day you signed your contract, do you, when you examined this wall?

A. I say before I get the contract.

Q. How long before?

A. Few days before: Before I figure the job, I look in what was.

Q. Was Thompson working there when you examined it?

A. Yes; he had some rock there he want sell to me—I don't want it.

Q. How much of his work had he done: had he finished

690 when you finished the job?

A. He got very little to do there—he was pretty near done.

Q. He wanted to sell you some of the stone, and you didn't want them?

A. Yes, sir; he had some rubble there was left and not worth much and so I did not take it.

Q. The best of the stone he had taken away at that time, had he?

A. Yes, he took away, and some was left that Mr. Strong took away.

Q. How high did that foundation extend, if you know, above the surface of the ground?

A. The west—about two feet and two and a half, but not on the top of the ground: It was above the ground—the street—the street was raised up a little every year—the house was built before the house (street) was raised and the foundation was below the street.

Q. Did you notice whether the foundation had been dug into—the trench dug for the foundation on the old surface of the ground, under the corner building that had been removed?

A. No, sir.

Q. You could not tell whether there had been a trench dug for the foundation, or whether the foundation had been laid right on the surface of the ground, as it originally was?

A. I think it been sunk—trench put in there, before go to put the foundation in, because the foundation was below the surface of the ground.

Q. Now, when did you examine that wall in the manner
691 that you have testified to, by plumbing it?

A. Before I get the contract—at the time I figure the job, I plumb the wall too.

Q. Your contract didn't include any of the erection of the wall above the foundation, did it?

A. Yes.

Q. Just the foundation?

A. Just the foundation.

Q. What difference did it make to you whether the upper part of that wall was plumb or not?

A. But I plumb it.

Q. What is that?

A. I plumb it myself; I seen it.

Q. But how were you interested in whether that wall was plumb or not?

A. I had interest to get the contract—the job, and I had to find out whether there was any accidents or not—whether dangerous or not—I had to look out for the wall, of course.

Q. And whereabouts did you plumb it, as you have stated—where abouts on the wall?

A. About the middle of the street.

Q. Well, you came to the conclusion that the wall was dangerous, did you: I think you so testified?

A. Yes, sir.

Q. You knew of course that your plans required you to dig under the wall?

Mr. FIELD: I object to that as not proper cross-examination.

Mr. MANN: He has not been examined about the plans nor has he testified that he ever saw them.

692 The COURT: Overruled.

Mr. FIELD: Exception.

Mr. MANN: Exception.

A. Yes, sir.

Q. Now, I asked you whereabouts on that wall it was that you

measured or tested it, to see if it was plumb, and you answered me, in the middle of the street: What do you mean by that?

A. That is the way they figure, to plumb it—I cannot plumb it on the door—I plumb it with the plumb line outside—anyway I can show you right now on the corner of the court house——

Q. But what did you mean by the middle of the street; the building was not in the middle of the street was it?

The COURT: As I understand him: He holds it up and sights across the corner.

Mr. WOOD: Perhaps he meant that.

The COURT: He stood in the middle of the street and held up his line and looked at the wall, I suppose—I am trying to facilitate matters——

Mr. WOOD: I do not understand that the witness said what your Honor says at all.

The COURT: Perhaps I am mistaken.

693 Mr. MANN: I think if you will let him he can explain.

A. I take the plumb line and I go on the street—on the middle of the street and plumb this court house if twenty-five yards away from here.

Mr. WOOD: I guess the Court was right.

The COURT: It seems to me a natural process. He said he could show you now how it is done.

Mr. WOOD: I think we all understand now.

Q. The way you did plumb this wall was to go out in the street in front of the building and hold up a plumb line and measure along the wall with the eye with that plumb line?

A. Yes; that is the way to plumb; no other way.

Q. Now what part of the wall were you especially looking at when you did that plumbing: was it the front end of that wall—you were standing right in front of the front end of that wall?

A. I stand on Central avenue and looking south—through south to north.

Q. From north to south, you mean, don't you?

A. Yes, sir.

Q. You were looking south?

A. Yes, sir.

Q. Now you were standing directly in front of that east wall and looking right down along the wall?

A. Yes, sir.

Q. Now at that time the front—the wooden front of the
694 building was entirely in place, was it not?

A. Yes, sir.

Q. And did you plumb on the corner of that wooden post to see how much out of plumb that wooden post was?

A. I did nothing about the post of wood over there—the adobes show fine by the side, just the same.

Q. Well, was the adobe wall flush with the wooden post at the corner?

A. One part.
Q. What part?
A. A little in front—inside it was a bevel there.
Q. Now, the front corner was pretty nearly plumb, was it, as you measured it?
A. That was the woodwork and not the adobe.
Q. You say the woodwork was plumb?
A. Yes, sir.
Q. Now, you remember that particularly, do you?
A. More or less, I think so.
Q. Well do you remember whether it was or not?
A. I think it was about plumb, because it was a short piece you know—it was only about eight feet high, you know—the rest was adobe on top.
Q. Why, my dear sir, don't you know that that wood work extended clear above the adobe: don't you know that?
A. In front?
Q. Yes——
A. On the side was adobe—about six feet more of adobe on top.
695 Q. Do you mean to tell this jury that that adobe wall extended above the wooden front?
A. The woodwork is nothing but a box——
Q. Never mind what it was: Do you mean to say that the adobe wall extended above the wood work from the front—as you were looking at it from the front?
A. Yes, sir.
Q. Very well: Now when you stood fairly and squarely in front of that wall, right along the edge of it, this wooden front would hide the adobe wall entirely from you, would it not?
A. You can see the adobe easy.
Q. Well, in order to see the adobe have you not got to take your position a little further east than a straight line of the wall?
A. I go straight with the corner of the line.
Q. Now, Mr. Grande, to plumb a wall in the method that you state you plumbed this, you would have to stand directly in front of the edge of that wall, would you not?
A. Yes, sir.
Q. If you stood any to the right or to the left of directly in front, you could not plumb it in the method you have stated, could you?
A. No, sir.
Q. Now, then, standing right in front, with the wooden front covering that building and the adobe wall behind the wooden front, could you tell whether that wall was plumb or not, with the wooden front between you and it?
A. If I see the wall was come out big in the middle and
696 on the top was crooked—on top toward the west——
Q. Now, would you not just as soon answer my question?
A. If you explain — me a little better, I can answer it better.
Q. What is that?
A. If you explain — me a little better, I can answer it better.

Q. With the wooden front of that building plumb, straight up and down on that side (counsel standing and demonstrating) and you standing directly in front of that edge, neither to the right or the left, tell the jury how you can tell how much any point of that wall—that front—how much the wall leaned to the west?

Mr. MANN: This is objected to because it assumes something which the witness has already testified is not true: He said the adobe wall was exposed.

The COURT: Sustained.

Mr. WOOD: Does your Honor understand that there was any adobe wall that extended outside of this front.

The COURT: That is what the witness said, I think.

Mr. WOOD: It is absolutely not true.

Mr. FIELD: Suppose the gentleman goes on the stand.

The COURT: I understand him to say that the adobe showed outside of the post. He spoke of the post.

A. It was no post: It was a little box outside.

697 Mr. MANN: He said they showed plain: I think is the way he put it.

Q. Now, Mr. Grande, since your counsel has suggested that the adobe wall extends outside of the post, what is your recollection——

Mr. MANN: Wait a moment: I wish to object to that form of question: Counsel has not suggested anything of the kind, and the court agrees with counsel about what the witness has testified to.

The COURT: Sustained.

Q. Do you mean to say that standing in front of that wall the adobe wall extended out to the east beyond the front?

A. Yes, sir.

Q. How much did it?

A. Enough to plumb, that is all: I do not know how much.

Q. Was it two feet, or six inches, or two inches, or less, which?

A. I do not remember exactly—about an inch or so—something like that; just enough to plumb, that is all it is.

Q. Can you tell us whether it was one inch or ten, or anywhere between the two?.

A. I do not know; I cannot remember.

Q. You cannot tell us whether it extended an inch, two inches, three inches, ten inches or a foot outside in front, can you?

A. It is years now: I cannot recollect exactly.

698 Q. Have you any judgment or recollection at all as to how far you now remember it extended out from the edge of the wooden front?

A. It don't was so much—something about an inch, more or less; something like that.

Q. An inch, more or less?

A. An inch, more or less; I do not remember exactly.

Q. Now, do you say an inch more or less: is that your best judgment?

A. Yes, sir.

Q. Then that adobe wall extended an inch more or less to the east of the front; we have got that, have we? That is right, is it?

A. Yes, sir; that is it.

Q. What part of it, the top or the bottom, ever extended an inch out?

A. On the middle it extended more because it was crooked.

Q. Was it an inch and three quarters?

A. In the middle had a belly, was big there—four to six inch-, no less.

Q. Are you sure it was not six feet?

A. I think not.

Q. You think not: Are you quite sure about that: Now where was six inch—top or bottom?

A. On the top it dropped in, and west.

Q. You saw that as you plumbed it, did you?

A. Yes, sir.

Q. How much did it drop in to the west on top; how many inches?

A. It was about nine inches to level of the joists and was about twenty-two inches on top of the fire wall.

699 Q. You saw that as you plumbed it, did you?

A. Yes, sir.

Q. That is, you looked through that front wall, and saw that it was twenty-two inches to the west of the front of that wall: that is right, is it?

A. Yes, sir.

Q. And you are still firmly of the opinion that that adobe wall extended clear above the top of the front?

A. Yes, sir.

Q. And your recollection is just as clear about that as it is about this inch, and nine inch as well, is it?

Mr. FIELD: We object to that as not proper cross-examination.

The COURT: Sustained.

Mr. WOOD: We except.

The COURT: You do not get a standard in that way.

Mr. WOOD: Here is the standard (exhibiting photograph exhibit).

Q. Now, Mr. Grande, who were working for you at the time, doing this excavation for you: Have you the record of the names?

Mr. MANN: Objected to as not proper cross-examination.

The COURT: Overruled.

700 Mr. MANN: Exception.

A. I change them every day; I cannot recollect; I remember Girard; he was my foreman: when I was not there he was there—the rest I do not remember—they change one day from the other—that is all I can recollect.

Q. Why didn't you keep any time book of the men who were working for you?

A. That is the last job I done in this town—I quit the contracting.

Q. Did you keep any time book of the men who were working for you at that time?

A. No, sir; I have that time, but I do not got it any more since I quit the work.

Q. Well, you did have a time book, didn't you?

A. Yes.

Q. And on that time book you did keep the names of the men who were then working for you, didn't you?

A. Yes, a book—memorandum—pocket book.

Q. Where is it?

A. I do not got it any more.

Q. What did you do with it?

A. I used it for something else—I kept track of it a while—it is little bit book.

Q. When did you destroy it, or how did you lose it, or where is it?

A. I never paid any attention to that book at all.

Q. You are sure you have not got it yet?

A. No, sir.

Q. Now, the one man that you can recollect that worked there, is the one that you mentioned, is he not?

701 A. He start to finish, because he tend to my business there.

Q. And does he happen to be alive?

Mr. MANN: Objected to as not proper cross-examination.

The COURT: Overruled.

Mr. MANN: Exception.

A. He is dead.

Q. So, you cannot remember a single living man who was working for you there at the time, can you?

A. I do not remember; no.

Q. You say you saw that wall at four thirty or five o'clock in the afternoon? Or about four o'clock in the afternoon, you said?

A. Yes, sir.

Q. And there were no men working up in that corner then?

A. No, sir.

Q. And there had not been any work up in that corner during that day, as far as you know?

A. I was start to build the corner and then stop. I just back and load wagon all day; that is all.

Q. Well, were there men working in that corner, digging up in that corner at any time during the day the wall fell?

A. No, sir.

Q. Not at all?

A. No, sir.

702 Q. Had they been working up in that corner the day before?

A. That same morning what was the time I want to fix that, it

was start and LaDriere he stopped it, and I don't go any further with it.

Mr. WOOD: I ask to strike that out as not an answer.

The COURT: The answer may be stricken out as not responsive, and the jury are so instructed.

Mr. FIELD: We except.

Q. Has anybody told you to tell us at any opportunity what LaDriere said to you?

A. No, sir.

Q. You are just trying to put that in for your own benefit, are you, Mr. Grande?

Mr. MANN: I object to that.

Mr. WOOD: That same thing has been twice stricken out before; and it looks to me that this is not accidental.

Mr. MANN: Does counsel mean to be trying to insinuate to the jury that we are accountable to the jury for his answers: we are not: it is plain to be seen he is testifying in his own way: and we object to the insinuations from counsel that we or anybody else is trying to put anything in——

Mr. WOOD: I am trying to clear you of it.

703 Mr. MANN: And still you say it looks very suspicious.

The COURT: It seems we are taking time for nothing unless it is the exercise of your wits.

Mr. MANN: We take exception to the language of counsel and except to the ruling of the court if he permits the question to be answered.

The COURT: He may answer the last question.

A. I have no benefit, myself, at all.

Q. You say that this excavation was how close to the Ruppe Wall, up in the corner—the front corner?

The COURT: When?

Mr. WOOD: When he last saw it before the fall of the wall.

A. I had about two feet and a half—something like two—near the Ruppe—right on the corner—we start for the first piers.

Q. Well, did you say that you were not within two feet and a half of the Ruppe wall, or do you mean that you had dug to the Ruppe wall two feet and a half?

A. To the Ruppe wall; don't go under the Ruppe wall at all.

Q. You want to tell the jury that that corner did not extend under the Ruppe wall at all, don't you, before it fell?

A. Not a bit.

Q. Not a bit: and that the excavation itself was only two feet and a half under the wall—I mean along the wall?

704 A. Just on the corner, that is all.

Q. Well, did it go clear up to the wall?

A. Them two feet, yes.

Q. And how deep?

A. About six feet—more or less, something like that.

Q. Well, it might have been seven, might it not?

A. I have the contract six feet—this means for the excavation.
Q. What is that?
A. My contract was six feet for the excavation.
Q. And you say it was that deep at that time?
A. No; not quite, but pretty near though.
Q. How much did it lack of it?
A. Oh, I cannot tell—exactly—more or less—about six feet—little more or less.
Q. Well you say that your contract was six feet six; that this excavation was about six feet down, more or less, and you say yet it was not clear down; now can you tell us how much it lacked then?
A. Well I can't tell exactly, no; I do not remember.
Q. Did you measure it?
A. I measured it when I start to build, but did not at the time——
Q. But this excavation—did you measure that; this excavation up near the corner did you measure that at any time of the day that the wall fell?
705 A. No, sir.
Q. I wish you could locate a little more definitely the time when you say work was stopped upon that excavation; was it the day the wall fell, the day before, or some other time when work stopped on the excavation in that corner?
A. Same day.
Q. And what time of the day?
A. About noon.
Q. Now, you are sure of that are you?
A. Yes, sir.
Q. Then they worked on that wall—your work on that wall took up till noon; that is, in that excavation in the corner—they were digging there up till noon?
A. Was not much to do; one man can do that in an hour—just to look at it and see what it was close enough—to see if it was down to build the pier.
Q. What I am trying to get at, and what I wish you would tell us, if you can, are you now sure that work in the excavation at that corner was going on up to noon of the day the wall fell?
A. Yes, sir.
Q. All right; and at that time the excavation you say was flush to the wall of the Ruppe building?
A. About two feet, yes, sir.
Q. For about two feet along the wall?
A. Yes; from the sidewalk in.
Q. And there was no work whatever commenced on the excavation for the second pier along the wall?
706 A. No, sir.

The COURT: It seems to me he has been over that.
Mr. WOOD: I did not think so.

Q. And there was no work whatever commenced for the third pier along the wall?
A. No, sir.

Q. And there was no work whatever commenced for that pier back at the point where the wall cracked?

A. No, sir; we was far away from that place.

Q. Had there been any digging at all done with the pick close up to the Ruppe wall back of this point of the front pier that you have spoken of?

A. Been picked up some good rock there—was kind of deep—that is all—when they destroyed that building they picked up some good rock at the building—that is some excavation was make—but was not much.

Q. But had you not dug out the dirt with pick and shovel close up to the Ruppe wall back to and beyond a point where the wall fell?

A. No, sir.

Q. After the wall fell did you do any more digging until after you had cleared away the debris of the fallen wall?

A. I did not touch it before I got the new contract.

Q. Where were you during the day—during the afternoon of the day that the wall fell?

A. I was around there, going and coming back all the time; at the time when it fell I was in the St. Elmo.

707 Q. All the time that you didn't spend on the job that day, you spent in the St. Elmo, did you?

A. On the St. Elmo, when I have dry, I get a good drink, and when not I stay by the work.

Q. And the St. Elmo is a saloon, is it not?

A. Yes, sir.

Q. And owned by Barnett?

A. Yes, sir.

Mr. FIELD: I wish to object to that; I do not see what difference it makes who owns the saloon.

Mr. WOOD: I do not think it does and I will withdraw that.

Q. How much of the time in the forenoon did you spend at the St. Elmo saloon that day?

A. I did not count them.

Q. Didn't count them—Well, what did you go there for, Mr. Grande?

A. I go to pray with the church.

Q. Counsel concedes that it was not to buy a bale of hay that you went over there; well you went over there to get a drink, did you?

A. Yes, sometimes a man come and say let us go and have a drink; sometimes we go and get a drink during the day.

Q. Now how many times did you have a drink with a friend at the St. Elmo?

A. I do not know.

Q. As a matter of fact you were intoxicated that afternoon, weren't you?

A. No, sir-e.

Q. And had you not been intoxicated and asleep on the

708 rocks out there during the morning, Mr. Grande?

A. You cannot prove that to me.

Q. All right, we will take that for an answer. Will you say you didn't have as many as fifty drinks that day?

A. I am not a hog.

Q. Well, we will pass that. Now, you can remember clearly can you everything that happened there that day in regard to that excavation?

A. Yes, sir.

Q. You had a talk with Mr. Ruppe you say about the condition of this wall?

A. Yes, sir,

Q. And that was just when you commenced digging, if I recollect aright?

A. Yes; about the time—a little before.

Q. And you told him then that the wall was dangerous and was going to fall?

A. Yes, sir.

Q. And he said he hoped it would, or something to that effect?

A. No; he said I do not care if it fall or not; I am well insured.

Q. And that is all that he said about it?

A. Yes, sir; that is all he said.

Q. And from that time on you did never a thing in the way of propping up that wall?

A. Was not necessary; I was far away from the wall yet.

Q. I did not ask you what was necessary; what did you do?

A. No, sir.

709 Mr. MANN: This is objected to as incompetent, irrelevant and immaterial, and not proper cross-examination, because it was not the duty of this man to prop up this wall.

The COURT: Overruled.

Mr. MANN: Exception.

Q. But all the time you knew it was dangerous?

A. Before we start the job.

Q. Well, you knew it afterward, didn't you?

A. I said that before.

Q. Well, you knew it all the time, from the time you started the job until the wall fell—you knew it was dangerous and likely to fall, didn't you?

A. Certainly.

Q. Now, don't you know that it was in your contract to take due precautions to keep that wall from falling, and di-n't you know it all the time?

Mr. FIELD: Objected to. The contract will show it if it is in the contract.

Mr. WOOD: The contract does show it.

Mr. FIELD: We think it does not show anythink like it——

Mr. MANN: I object to it also as not proper cross-examination, and also to the statement of counsel to the jury as to what the contract shows——

Mr. WOOD: The contract is in evidence and I am simply
710 quoting from it.

Mr. MANN: Defendant Weinman objects for the reason that he had no part in the contract; was a stranger to it and is not bound by it in any way or form.

The COURT: Objections overruled.

Mr. FIELD: We except.

A. Yes, sir.

Q. When did you first see those cracks in the wall that you have mentioned, Mr. Grande?

A. I see them before I get the job—before I get the contract.

Q. I did not catch that?

A. (Re-read).

Q. How big a crack was that one that you saw that you say was about fifty feet—when you first saw it before you got the contract?

A. Oh, it was pretty good size.

Q. Well, how big was it at the top?

A. Oh, it was about three inch.

Q. Three inches?

A. Something like that; some place more and some place less.

Q. Did it then extend clear from the top to the bottom of the wall?

A. Not quite at the bottom; was few feet left.

Q. Go clear through the wall?

A. No, sir.

Q. How do you know it didn't?

A. Oh, through the wall? Yes—it was through and through—I did not understand it.

711 Q. Could you see it from the inside?

A. Wall was paper inside—I do not know—I never look at inside—I see it from outside—it was big enough you can see.

Q. Could you see clear through that crack from the outside, so as to know whether it went through the wall?

A. Yes, sir; I can—I can see it, but there was piece of paper on inside—there was paper on one side—all paper on.

Q. From the outside, you could see the paper on the inside could you, Mr. Grande?

A. On the top, yes.

Q. You remember that you did see it in looking at the crack?

A. No, sir; I never seen it: Can be seen all right, but I never looked at it.

Q. As a matter of fact, you are guessing at that crack, are you not, Mr. Grande?

A. More or less that is the size.

Q. Are you not guessing at the appearance of it, and are you not guessing at whether or not it went through the wall, or are you telling from what you know?

A. It passes through the wall all right.

Q. Then you are not guessing, but you are telling us what you know?

A. That is all.

Q. You were a witness, were you not Mr. Grande in the trial of this case that took place in April—in 1906—the second trial of this case, I mean?

A. Yes, sir.

712 Q. Did you not upon that trial testify as follows—speaking of this excavation in the northeast corner of the Ruppe building—"We built this pier five feet square—two feet and a half under Mr. Ruppe's wall?"

A. It ought to be that way but not built yet.

Mr. WOOD: I ask to strike that out as not an answer to the question.

The COURT: Had you finished the question?

Mr. WOOD: Yes, I had finished——

Q. Did you so testify?

The COURT: The question is whether you testified so at that trial—The answer may be stricken out.

Q. Did you so testify upon that trial?

A. No, sir.

Q. And were you not asked the question then by your own counsel, by the defendants' counsel, I mean, as follows: 'Two feet and a half under Mr. Ruppe's wall?' and did you not answer, "And two feet and a half under the sidewalk—that was the footing—?'

A. That is the way the plan called for—ought to be that way and been that way after we done it too.

Q. Did you or not so testify upon the former trial, as I have read to you?

A. No, sir.

713 Q. All right: Now Mr. Grande the excavation at the north end of that cellar had been partially completed before the fall of this wall, had it not?

A. That was not near the wall at all.

Q. Toward the north end of the lot had not the excavation been completed in part at the time of the fall of the wall?

A. It is about two feet excavation—as I say before, on the corner.

Q. That had been completed, had that—two feet, as you say?

A. On the inside it don't was complete yet at all.

Q. But for depth was it complete?

A. Well, was about six feet—not altogether—not complete entirely.

Q. Why, to the north end of that wall and from the northeast corner of that lot you had not only completed the excavation, but a portion of the wall had been built, had it not?

A. No, sir.

Q. I do not want to mislead you, or have you misunderstand me. I am referring to the lot upon which you had dug—the corner lot: Had you not completed, or built a portion of the foundation wall in the northeast corner of that lot for the new building?

A. On the corner lot, number one?

Q. Yes?

A. I was start the piers on the corner on one side; yes, sir.

Q. And had you not completed a portion of that wall along the north end of lot number one, reaching over toward the Ruppe wall?

714 A. I was done about two or three days' work already.

Q. Now how far in the direction of the Ruppe wall from that corner had you built the foundation wall?

A. I was about fifteen feet away from Mr. Ruppe.

Q. That is, you had built somewhere in the neighborhood of ten feet in the direction of the Ruppe wall, from the corner?

A. From the corner, yes, sir.

Q. And how far down along the line of Second street had you built the wall on the east side or the piers?

A. I do not remember exactly—but some wall built—well—on the other side, you know.

Q. Well was it not almost half way down on Second street?

A. No, sir.

Q. Now, are you sure about that Mr. Grande: may you not be mistaken?

A. Yes, sir.

Q. Well, did you not testify upon this second trial in that connection: "Question: Do you mean to tell the jury that the foundation had been put into a point here (showing) and a few feet from the northeast corner of Ruppe's building, around to the corner of Railroad avenue and Second street and down Second street a distance—way down here almost half way on Second street?" and did you not answer that "Yes, sir?"

A. We don't have half way—about two piers built, on that time, from the south to the north.

715 Q. Well, do you remember being asked that question and giving that answer when you testified on the second trial?

A. Was about half way the excavation but not the wall.

Q. No, no; do you remember so testifying?

A. I think I say it.

Q. What is that?

A. I think I say it, but not so much wall as I say there—must be a mistake.

Q. You say you think you did say that?

A. Yes, sir.

Q. Then were you not asked this: Question: That that foundation had already been put in there on the 30th day of June? Answer: Yes, sir. Question: On the day that the wall fell? Answer: Yes, sir:" Did you not so testify upon that former trial?

A. Yes, sir.

Q. Well, is your recollection better or poorer now as to those facts, than it was when you testified upon that trial in 1906?

Mr. FIELD: Objected to because it calls for the witness to usurp the functions of the jury.

The COURT: Overruled.

Mr. FIELD: Exception.

A. I remember the same now as it was before.

Mr. WOOD: That is all.

716 Redirect examination by Mr. MANN:

Q. Now, Mr. Grande, calling your attention again to your testimony at the second trial of this case, a portion of which was read to you by counsel, I will ask you if your testimony at that time was as follows? "Question——

Mr. WOOD: If the court please, counsel is asking the witness now as to what his testimony was, and proposes to read some of it in respect to questions as to which the witness positively denied in answer to my questions that he gave any such testimony.

Mr. MANN: It is at the bottom of page 352—because he didn't read all of it, and no witness or anybody else could get the connection of it.

The COURT: Objection overruled.

Q. (Cont.) —Question: And those were the instructions that Mr. La Driere gave you? Answer: We built this pier five feet square—two feet and a half under Mr. Ruppe's wall—— Question: Two feet and a half under Mr. Ruppe's wall? Answer: And two feet and a half under the sidewalk—that was the footing—— Question: You didn't build it, did you? Answer: I built it afterward, not at that time. Question: You built it afterward—the plans and specifications shows how that pier was to be built? Answer: Yes, sir." Will you state whether or not you were asked those questions and gave those answers?

A. Yes, sir.

717 Mr. MANN: That is all.

Recross-examination by Mr. WOOD:

Q. Didn't you deny to me about five minutes ago that you were asked one of those questions and gave that answer; did you not say that you did not?

A. Yes; I did answer to you: It must be a mistake myself not understanding.

Q. How are you able to remember when Judge Mann asks you if you gave those answers and you are not able to remember, or deny it, when I ask you; can you account for that?

A. For I said that before—I had to build those piers under the Ruppe building and under the sidewalk five feet square—that is what I said before.

Q. Now, you did testify upon that trial, didn't you, "We built this pier five feet square, two feet and a half under Mr. Ruppe's wall;" you did testify to that didn't you?

A. I have to—but it was not built yet.

Q. Did you testify to that on the former trial or not?

A. Must be mistake somewhere, because the wall don't was built before the house fell.

Q. Yes, there must be a mistake somewhere; I will admit that: But the question is did you testify to that on the former trial?

A. I don't think so.

Q. Now, you never built a foundation at all under Mr. Ruppe's

wall, did you, because the wall was removed long before the foundation was built, was it not?

718 Mr. FIELD: We object to that as not proper cross-examination.

The COURT: Objection sustained. The subject has all been gone over and there cannot be any doubt upon that last point.

Mr. WOOD: We except. And that is all.

E. FOURNELLE, introduced as a witness in behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. MANN:

Q. State your name to the jury?
A. E. Fournelle.
Q. Where do you reside?
A. In Albuquerque.
Q. How long have you lived in Albuquerque?
A. About a little over thirteen years.
Q. And what is your occupation, Mr. Fournelle?
A. Contractor and builder.
Q. How long have you been engaged in that occupation of builder and contractor, in Albuquerque?
A. About two years.
Q. And how long have you been engaged in the carpentry trade here in Albuquerque?
A. Since I came here.
Q. Do you know the building located on the second lot from the corner of Railroad avenue and Second street, on the south side
719 of the street, which was occupied by Mr. Ruppe as a drug store in 1902?
A. I remember that there was a building there once.
Q. Do you remember who occupied that building prior to Mr. Ruppe?
A. If I remember right there used to be a saloon there?
Q. Do you remember who ran the saloon there?
A. There was a Dutchman and a Frenchman—I believe Heisch and Beitzler, if I am not mistaken.
Q. State whether or not you ever set up any fixtures in that building prior to the time Mr. Ruppe occupied it?
A. Yes, sir.
Q. Now state to the jury the condition of the east wall of that building at the time you set up the fixtures?

Mr. WOOD: I do not think it appears that any fixutres were set up on that wall.

The COURT: I think the time should be fixed more definitely.

Mr. FIELD: That was not the objection, as I understood it.

Mr. WOOD: I will base it on both grounds.

The COURT: I suppose that would come in later when it might not be so convenient to fix it.

Mr. Wood: We object on the ground that it does not ap-
720 pear what time with reference to the fall of the wall that was, or whether any fixtures were put up on the east wall.

The Court: Objection sustained.

Mr. Field: We except.

Q. State as near as you can what time with reference to the time Mr. Ruppe moved into the building it was that you set up the fixtures you testified about in this room, or building?

A. I cannot remember.

Q. State what fixtures you set up in that building?

A. Saloon fixtures.

Q. Did you set up more than one set of fixtures in that room?

A. Yes, sir.

Q. In setting up the fixtures, either of them—did you have occasion to notice the condition of the wall of that building at that time?

A. Yes, sir.

Q. State to the jury what the condition of the wall was at the time you set up the fixtures?

Mr. Wood: If the court please, I think he ought to be able to fix the time more definitely.

After discussion.

Mr. Wood: I will withdraw the objection.

A. Which wall?

Q. The east wall?

A. The east wall was out of plumb.

721 Q. Can you state how much it was out of plumb Mr. Fournelle?

A. My best recollection of it is that there was a ceiling about twelve feet high and the bar fixtures which I set up on the east wall were about nine or nine and a half feet high, and it was from six to seven inches out of plumb—I cannot recollect any more exactly.

Q. Now state to the jury what you did if anything with reference to the setting of the fixtures, so as to make the fixtures plumb, referring now to the east wall?

A. Why——

Mr. Wood: I object to it as cross-examination of his own witness.

The Court: Overruled.

A. Why, the set fixtures was plumb.

Q. And how far from the wall, at the bottom of the wall, were the fixtures?

A. I cannot remember exactly.

Mr. Field: As near as you can remember.

A. It is too long ago—I cannot remember about that now.

Q. Now, what fixtures did you put in there, that were connected in any way with the east wall?

A. Saloon fixtures.

Q. Describe them: state what they were?

A. Where?

The COURT: What were they?

722 A. I believe if I remember right I set a few partitions up in there—a back bar—front bar——

Q. And when did you put the other fixtures in there that you have testified about?

A. I set them in a little bit before that.

Q. For whom did you put in the saloon fixtures along the east wall?

A. For Heisch and Betzler.

Q. And how far along the east wall did the saloon fixtures extend—in front?—that is from the front back, as well as you can remember?

A. Oh, I believe about fifteen feet; somewhere like that.

Q. And what was back of those fixtures?

A. There was a partition.

Q. And what was the condition of the wall at the place where you put in the partition?

A. It was out of plumb.

Q. Can you state about how much they were out of plumb?

A. I cannot remember.

Q. Do you know about what time in the year it was that you put in the saloon fixtures for Heisch and Betzler?

A. No, sir; I do not.

Q. Now, the other fixtures that you put in, what wall were they against?

A. On the other side—on the west wall, I believe—or on the east wall—I do not know which one I set in first.

Q. Well, did you set in one against the west wall and one against the *west* (east) wall; it that what you mean?

723 **A. Yes, sir.**

Q. And whom did you put in those fixtures for?

A. For Heisch and Betzler.

Q. Both sets of fixtures then were put in for the same parties, were they?

A. Yes, sir.

Q. Now, what fixtures as near as you can remember, did you put in along the west wall of the building Mr. Fournelle?

A. I cannot remember.

Q. Well do you remember whether they were fixtures for a dry goods store or for a wet goods store, or what were they?

A. They were saloon fixtures.

Q. Do you remember how much space they occupied along the wall?

A. Well the first bar fixtures was a sixteen foot bar, and the last bar fixtures was a twenty four foot bar.

Q. Now, do you remember which one of those bars you put along the east wall?

A. No, sir; I do not.

Q. And what was the condition of the west wall?

A. The west wall was out of plumb.

Q. Do you know how much, or about how much it was out of plumb?

A. I cannot remember exactly.

Q. Do you know when those buildings were put up; that one and the one on the corner lot?

A. Yes, sir.

Q. When were they put up?

A. I do not remember what year.

724 Q. Which one was put up first if you remember?

A. Put them both together up.

Q. Were you here at the time those buildings were built?

A. Yes, sir.

Q. How long ago was that?

A. I do not remember.

Q. Well, how long have you been here?

A. Thirteen years.

Q. Do you mean you have only been here thirteen years now?

A. Yes, sir.

Q. And those buildings then were put up after you came here?

A. I understand you to say the building on the lots now—the old buildings they were here when I came here.

Q. You don't know then when the old buildings were put up?

A. No, sir.

Q. I will ask you Mr. Fournelle whether you ever did any work on or under the floor of that Ruppe building?

A. Yes, sir; when the saloon was in there.

Q. Now describe to the jury what work you did there, with reference to that floor?

A. On the floor—it gave way on account of the joists were rotten on the ends—then I went underneath with jack-screws, and I raised the floor up and put some props under it.

Q. At which end of the floor?

A. It was about in the middle of the building; that is, on

725 the side.

Q. On the north side or south side?

A. Well, on the east side.

Q. Yes; I was the one turned around: Do you know how many of those joists had given way?

A. Oh, there were two pieces, about twenty feet long.

Q. For whom did you do that work?

A. For Heisch and Betzler.

Q. Those are the same parties you have mentioned for whom you put in the saloon fixtures?

A. Yes, sir.

Q. State to the jury whether or not you ever did any work on the front window, at the northeast corner of that building?

A. Yes, sir.

Q. Do you know when?

A. One Sunday.

Q. Who was occupying the building at that time?

A. Heisch and Betzler.

Q. Now, state what condition that window was in and what you did with reference to it?

A. The plate glass cracked in it, and I took two pieces of board and put them across so that it would not fall out.

Q. Do you know what caused the plate glass to crack?

Mr. WOOD: Objected to as calling for the conclusion of the witness and not for the facts.

The COURT: He can answer yes or no.

726 A. No; I did not.

Q. How long did you say you had been engaged at the carpenter's trade?

A. Thirty-six years.

Q. Now, from your knowledge and experience as a mechanic, can you state an opinion as to what caused that glass to crack?

A. I think I do.

Q. You may state.

Mr. WOOD: We object to that upon the ground that it is calling for the conclusion of the witness and not a proper subject for expert testimony, and the witness is not shown competent as an expert to answer it.

The COURT: Overruled.

Mr. WOOD: We except.

A. I believe there was a settling in the building, or in the frame work—the building and the frame work did settle a little.

Q. I will ask you to state to the jury whether or not — the frame work of that building to determine whether or not it was square and plumb at that time?

A. The front was not square, nor plumb.

Q. Can you state to what extent it was out of square, and out of plumb?

A. No, sir.

Q. You say that that front was out of plumb; state which way it leaned?

A. It leaned toward the west.

727 Mr. MANN: That is all.

Cross-examined by Mr. WOOD:

Q. Mr. Fournelle, a very little slanting, out of plumb, is sufficient to break glass in a window, is it not?

A. About three-fourths of an inch in a plate glass.

Q. How big were those glasses, if you recollect?

A. I cannot remember.

Q. Do you know whether they covered the whole front or less?

A. Why, they were two plate glasses and double doors in it, and I believe they covered the whole front.

Q. They were as much as eight or ten feet wide; each pane, something like that?

A. No; I do not think.

Q. Well, your best recollection as to how wide they were?

A. I suppose about between seventy and eighty inches.
Q. And what is your recollection as to their height?
A. They was a little higher; I do not remember—I cannot tell.
Q. But a little higher, you say: approximately, your best judgment; how high?
A. I suppose they were about eighty inches—or eighty-five inches—I do not remember.
Q. Now, if I understand you, you say three quarters of an inch in settling is sufficient to crack a glass?
728 A. In a frame-work, yes.
Q. How far from the front of the building was it to the point where you found those sleepers under the floor rotted away?
A. Oh, about between twenty-five and thirty feet, I believe, from the front.
Q. Then the sleepers under where the bar had been were rotted by the water getting in there.

Mr. MANN: Objected to because the witness has not been asked nor has he stated what rotted the sleepers.
The COURT: Sustained.

Q. Do you know what caused them to rot?
A. Dampness and dry air.
Q. Do you know what the dampness came from there?
A. Oh, there is always more or less dampness close to the ground.
Q. Where were the bar fixtures located with reference to that lot?
A. They were on the west side and these were on the east side.
Q. Well, didn't you say that you set up bar fixtures on the east side, too?
A. Yes, sir; I set them up after.
Q. After you fixed the floor?
A. Yes, sir.
Q. Do you know what that building had previously been used for?
A. No, I do not remember.
Q. You found no rotting under the building save at the
729 point where you have indicated that you fixed them up?
A. Yes, sir; that is all.
Q. Now you say that the building was five or six—or did you say six or seven inches out of plumb?
A. Somewhere like that.
Q. Something like that?
A. Yes, sir.
Q. You would not undertake then to state in what degree—with any degree of accuracy how much out of plumb it was, would you?
A. No, sir.
Q. You don't remember?
A. No, sir.
Q. All you remember is that it was some—a little out of plumb?
A. I remember; yes, sir.
Q. Do you know how high that building was on the inside?
A. Twelve or fourteen feet: I do not remember.

Q. You say you put in a partition there, and in that way discovered it out of plumb—I think?
A. Yes, sir.
Q. And do you now recollect how high that partition was?
A. Oh, about eight feet.
Q. And is it not true that in that partition you found in those eight feet that it was only two and one-half inches out of plumb?
A. I cannot remember.
Q. You would not say that was not the situation, would
730 you?
A. I know it was out of plumb.
Q. What is that?
A. I know it was out of plumb.
Q. But as to the amount you would not say it was more than two and a half inches out of plumb in that eight feet height of partition, would you?
A. I do not remember.

Mr. Wood: That is all.

Jacob A. Weinman, one of the defendants, introduced as a witness in his own behalf, being first duly sworn, testified as follows:

Direct examination by Mr. Mann:

Q. What is your name?
A. J. A. Weinman.
Q. Are you one of the defendants in this case?
A. Yes, sir.
Q. Did you know the building that stood upon lot 2, block 16, of the original townsite of Albuquerque?
A. Yes, sir.
Q. I refer to the building that stood there up until about June, 1902.
A. Yes, sir.
Q. Do you know when it was occupied, if ever, by a man by the name of Heisch?
A. Yes, sir.
Q. State when that was.
A. The year 1901.
Q. Do you know what time Mr. Heisch left that building?
731 A. I do not remember the exact month.
Q. How long was it occupied by him?
A. One year.
Q. Do you know who occupied the building just prior to the time that it was occupied by Mr. Ruppe?
A. Mr. Heisch.
Q. You know Mr. Ruppe, do you?
A. Yes, sir.
Q. How long have you known him?
A. About 28 years.
Q. State whether or not you ever had any conversation with

Mr. Ruppe with reference to the party wall between lots one and two?

A. I did.

Q. State when and where your conversation was had?

A. In the store occupied by him.

Q. And when, Mr. Weinman?

A. After I had signed the party wall agreement, and also before that.

Q. State what conversation you had with him at the store there after you had signed the party wall agreement.

A. I said to him that I had made a party wall agreement and that we would have a straight wall after the wall was put up, and he agreed that we would have a nice straight wall.

Q. What else, if anything, was said between you there at that time?

A. We talked about so many things—I would be in there every day and I—at various times asked him if there was any
732 danger of the wall falling and he said no, if it would the paper in the wall would crack.

Q. Do you know when those two buildings that occupied lots 1 and 2 were built, Mr. Weinman?

A. I believe I do.

Q. Can you state to the jury about when those buildings were put up?

A. About 1881.

Q. Where were you, Mr. Weinman, when the building fell?

A. In the front of the building, on the side walk of the building, rather.

Q. How long had you been there when the building fell?

A. About 15 minutes.

Q. What was the occasion of your going there?

A. Mr. Ruppe sent his stepdaughter down to the store and she informed me that the building was about—her father had sent her.

Q. And what did you do then?

A. I was writing a letter, signed it—was in my shirt sleeves, put on my coat and walked to the store very leisurely.

Q. And how long had you been there before the wall fell?

A. I should judge about 15 minutes.

Q. State whether or not Mr. Ruppe had ever said anything to you about the falling of the wall prior to that time?

A. He had not.

Q. Which one of those buildings—the buildings on lots 1 and 2 was building first?

A. I am not sure about that.

733 Q. Well, what is your recollection as to the time that the two buildings were built?

A. I believe the lot 1 was built on first.

Q. Describe to the jury as near as you can the falling of that wall as you saw it.

A. After coming there and standing there about 15 minutes I saw the wall fall (indicating) or the ceiling crack—top of the wall,

up in that corner (indicating)—from the window—then the back wall, about 50 feet back fell in the lot—the beams from this end (*indicated*) fell upon—this way—that was all there was. The window cracked, broke down in front.

Mr. MANN: That is all.
Mr. FIELD: I wish to ask this witness a question or two.

Direct examination by Mr. FIELD:

Q. Mr. Weinman, attached to the answer of the defendant Barnett in this case there is a paper, purporting to have been executed by you and which I show you—a copy of which is in this record which I now show you (exhibiting paper to witness).

Mr. WOOD: Is that the release?
Mr. FIELD: Yes, that is the release.

Q. Now, look at that and say whether or not you ever executed any such paper to Mr. Barnett?

Mr. WOOD: I think it does not appear as yet in the record that the paper which counsel is calling the witness's attention
734 to is one of those papers which has been referred to here as being lost at the former trial.

Mr. FIELD: I do not think it is one of those papers—it was never used. This is mere inducement. I do not expect to offer the paper—I expect to prove that Mr. Weinman sold this lot to Mr. Barnett after the wall fell and executed this release as part of the same transaction and not for any other consideration.

A. I did.
Q. State, Mr. Weinman, whether or not, after the fall of this building you sold to Mr. Barnett lot No. 2.
A. I did.
Q. And state whether or not the execution of that release was a part of that transaction of the sale or whether that release was made upon some independent consideration.

Mr. WOOD: I object to that as incompetent and immaterial and as calling for the witness's conclusion and as oral evidence to contradict or vary the terms of a written instrument, and as attempting to contradict the expressed allegations of the pleadings. I am looking at them. I am under the impression that there is an allegation in the pleadings that it was for a separate and distinct consideration.

The COURT: Your complaint?
735 Mr. WOOD: No, their answer.

After argument and examination of the pleadings.

The COURT: The witness may answer.
Mr. WOOD: We except.

A. Yes—I do not quite understand that—whether this money paid to me was in payment of the building, is that what you want to know?
Q. I will change the question: at the time you sold this lot to

Barnett, did he pay so much for the lot and so much more for damages, or did he pay you a lump sum for the lot and damages.

Mr. WOOD: Objected to on the same ground as before and on the further ground as leading and suggestive.

The COURT: He can answer.

Mr. WOOD: We except.

A. He paid me this money for the lot 2, block 16, and releasing him from all damages, as far as I was concerned.

Mr. FIELD: That is all.

Mr. WOOD: We ask to strike out the last answer on the ground that it gives the conclusion of the witness and attempts to contradict the terms of a written instrument, to which he has referred.

The COURT: Overruled.

736 Mr. WOOD: We except.

The hour of 12 o'clock noon having arrived, a recess was here taken until 2 o'clock P. M.

Cross-examined by Mr. WOOD:

Q. Mr. Weinman, you are one of the defendants in this case?

A. Yes, sir.

Q. You say that after you made this party wall agreement with Mr. Barnett, that you had several talks with Mr. Ruppe concerning the danger of that building—your building falling.

A. I did not say that.

Q. Didn't you say that at various times after you executed that party wall agreement that you asked Ruppe if there was any danger of the wall falling?

A. I did.

Q. Well, would you not call that having talked with him about the danger of the wall falling?

A. No, sir.

Q. Was the talk all on one side or did you both engage in it?

A. We both engaged in it.

Q. Well, I guess we will have to call it talks with him about the wall falling, won't we?

A. Not necessarily.

Q. Well, why not; where is the difference? Explain it to us.

A. He used to talk about business—soda water business there—how my business was—I remember several times coming in there and asking him if there was any danger and he said: No, if

737 there was the paper on the wall would crack.

Q. And that is not having talks with him about the danger of the wall falling?

A. Not in my opinion.

Q. Well, how many times after you made the party wall agreement was the subject of the danger of the wall falling discussed between you and Mr. Ruppe—how many times?

A. It was not discussed at all about the wall falling.

Q. Why, you were not afraid the wall would go up, would you?

A. I am not letting you put words in my mouth—I am going to answer the way I know how.

Q. Is there anything misleading about my question that you do not understand?

A. I think there is—yes.

Q. You know what a talk is, don't you?

A. Yes, sir, I do.

Q. It is words between two persons, is it not?

A. Yes, sir.

Q. Now I guess we have got that; now then, how many times were there words between you and Mr. Ruppe concerning the danger of this wall falling after you made the party wall agreement?

A. Once, that I know of.

Q. Will you limit it now to once?

A. Oh, I don't remember—may have been two times or three times.

Q. Didn't you say to your counsel that it was various times—was not that your language?

A. It might have been: I might have said it.

738 Q. Well, is it your recollection now that it was once, more than once, or various times.

A. Various times.

Q. And did you ask Mr. Ruppe each time if there wa any danger of that wall falling?

A. I believe I did.

Q. Why, Mr. Ruppe was not an architect, was he, so far as you knew?

A. No; he could tell whether the wall was cracking or there was any danger.

Q. Did you ever know Mr. Ruppe to be anything of a specialist on the strength of walls?

Mr. FIELD: All this may be interesting but I do not see the materiality of it; it does not seem to me to be cross-examination, and I object to it.

The COURT: Overruled.

Mr. FIELD: I except.

A. I did not.

Q. You knew that Mr. La Driere was there overseeing the work, didn't you, as the architect for Mr. Barnett?

Mr. MANN: I object to it as not proper cross-examination; he was not asked anything about Mr. La Driere nor was Mr. La Driere employed by him in any way.

The COURT: Overruled.

Mr. MANN: Exception.

739 A. I do not remember whether he was or not.

A. You do not remember?

A. No.

Q. *He* drew that party wall agreement between you: do you know?

3717

A. I think Mr. La Driere drawn it.

Q. And didn't you know that he was the architect in charge of that work for Mr. Barnett?

Mr. FIELD: I object to it as wholly immaterial and not proper cross-examination.

The COURT: Overruled.

Mr. FIELD: Exception.

A. No.

Q. Did you see La Driere around there at any of these times when you were having the conversations with Mr. Ruppe?

Mr. MANN: Same objection.

The COURT: Overruled.

Mr. MANN: Exception.

A. I may have.

Q. Well, while you were having those conversations with Ruppe, it was during the time that they were digging on that lot next to yours, was it not?

A. Yes, sir.

Q. You evidently had some little fear about the walling falling, didn't you, Mr. Weinman?

740 A. No, I did not.

Q. Well, why did you ask Ruppe about it then?

A. Well, I thought perhaps there might—might fall.

Q. You were not afraid of it but you thought perhaps it might fall, is that it?

A. Yes, sir.

Q. Well, did you ask anybody else beside Ruppe about the danger?

Mr. MANN: Objected to as not proper cross-examination.

The COURT: Overruled.

A. I may have asked some one.

Q. Didn't you ask Mr. La Driere?

Mr. FIELD: Same objection.

Mr. MANN: Same objection.

The COURT: Overruled.

Mr. MANN: We except.

A. No.

Q. You were satisfied with the opinion of Ruppe, were you.

A. Yes, and my own opinion.

Q. Well, why weren't you satisfied with asking him once; why did you keep on asking him at various times, if you were satisfied?

A. I used to go in there every day and the same as a man would ask—I would ask him about the wall or how his business was—different things—about various things.

741 Q. Now, Mr. Weinman, was it not a fact that you had some little worry in your mind about this wall falling that led you to speak of it on various times to Mr. Ruppe, while you were in there?

A. It is not a fact: I was not a bit worried.

Q. Not a bit: you were no more interested or worried about the question of that wall falling than you were about — or the weather, that is true, is it not?

A. Why, certainly.

Q. Was that your wall that you were asking about?

A. It was not my wall, no.

Q. Who owned it.

A. It was in my name: it was owned by my brother-in-law.

Q. It was because it was in your name that your were worrying?

A. No, I was not worrying at all, not more than you were—I did not worry about it.

Q. Not a bit?

A. No, not a bit.

Q. Nor any other members of your family?

A. Yes—my walls were about to fall in my house and I am not worrying about it, either—all cracked.

Q. Well, what does it take to worry you?

A. Nothing on earth worries me.

Q. Well, so when you finally heard that the wall was about to fall you went on and finished the letter you were writing?

742 A. I did.

Q. Then you put your cuffs on.

A. No, my coat.

Q. And your coat—and did you wash your face and hands?

A. No, I walked leisurely down the street though.

Q. How much did you have to do in finishing that letter after you were told that this building was falling?

A. Very little—probably signed my name.

Q. You might have written three or four lines?

A. I might have, yes.

Q. Do you remember who you were writing to and what it was about?

A. No.

Q. And after you had leisurely finished the letter and put your coat and hat on, you leisurely walked down the street, is that it?

A. Yes.

Q. No worry in your mind about the building falling, was there?

A. Not the least.

Q. Not the slightest?

A. Not the slightest.

Q. In fact, you were rather anxious to have it fall, were you?

A. No.

Q. But it didn't worry you any?

A. Not a bit.

Q. And you didn't take a quick step between your place of business and that building, did you?

A. Not that I remember.

743 Q. And then, when you got up there, you stood out on the road and studied the way it fell?

A. I studied to see what was going to happen—I saw the crack

on the top of the building and I seen the wall fall and I seen the rafters coming down—I was not studying anything particularly.

Q. Well, what in the world did you go up there for?

A. At Mr. Ruppe's request?

Q. You would not have gone an inch if he had not asked you to come, even if you knew the whole thing was falling?

A. Oh, I might have, yes—I would have gone if I had known it was going to fall.

Q. Why, you were told it was falling, so you testified.

A. Yes, sir.

Q. And you say you went up there fully five minutes before the building got clear down and fell?

A. I judge about 15 minutes.

Q. Did it go all at once when it got started or slowly, gradually sunk down?

A. Started to crack right on this corner (witness pointing up).

Q. Describe what corner you mean.

A. Well, we will say this is the front on Railroad avenue—the track—began falling out this way—broke there by the crack—came down into the lot (indicating).

744 Q. Now, the first thing you saw of the wall falling was this part right up to the front corner next to Railroad avenue—began to crumble and break away and the adobes fall down?

A. And the windows break.

Q. And the windows broke and after that had gone on for a while, then you looked back and saw it giving away at this crack some fifty feet back?

A. Yes, I judge it was that way.

Q. And finally the whole wall slid down into the excavation?

A. Yes, sir.

Q. Where did you stand, Mr. Weinman, when that started to fall, with reference to the building?

A. Right side of the building.

Q. You were a little to the east of it, weren't you?

A. Yes, sir.

Q. Were you in the road or on the sidewalk?

A. On the sidewalk.

Q. Did you go in the building in that fifteen minutes that you waited while you were up there?

A. I did not.

Q. Was anybody in the building during that time?

A. I don't remember.

Q. Did you look to see?

A. I don't remember.

Q. You cannot remember that: you were not particularly interested in what happened inside of the building?

A. Oh, I spoke to Mr. Ruppe about going in and taking some things out of there and he stated McMillen would not allow anybody in—he had chased the customers out of there.

745 Q. Mr. Weinman, your counsel has asked you concerning some agreement or conveyance which you signed and delivered to Mr. Barnett after the fall of the wall?

Mr. FIELD: I am not Mr. Weinman's counsel, and I asked him.

Q. Well, somebody asked you——

Mr. FIELD: I object to the question as it is framed: I am not counsel for Mr. Weinman, I am counsel for Mr. Barnett.

Q. I will say, Mr. Field asked you, instead of your counsel: what instrument was that that he was asking you about and called your attention to?

A. About the sale of the lot.

Q. Can you find the copy of the instrument that he showed you?

The COURT: You are not using the word that Mr. Field used: he said agreement and you say instrument—he did not say writing.

Mr. WOOD: Oh, yes, he showed it to him; that was my objection.

The COURT: I think Mr. Field was referring all the time to an agreement which he said was carried out at the time—they were talking about an agreement which preceded both of those instruments, which they were the effect of.

Mr. WOOD: He called the witness's attention specifically
746 to a copy of the written agreement in there, and——

Mr. FIELD: That word agreement was in the pleadings and not used by me at all.

After discussion:

Q. Can you find and tell us what was the release or instrument which Mr. Field showed you this morning when he asked you about consideration?

Handing witness a copy of the record of the former trial.

A. This is it.

Q. Well, now, will you tell us what that instrument is?

A. Simply releasing Mr. Barnett from any damages which I might ask from him on my——

Q. Give it to us as it is there: just exactly as it is there.

A. I am telling you what it was for.

Q. I asked you what it is: will you read it to us?

A. I signed this.

The COURT: I do not think he could sign what is in this record.

Mr. WOOD: I thought so myself, but your Honor overruled my objection.

After discussion.

Mr. WOOD: The instrument itself would be the best evidence and I want the instrument itself in the record: that is my only
747 object.

The COURT: It seems to me it must be in the evidence.

Mr. WOOD: Not as evidence: I am sure it is not, and know of no other way to get it in, except by this question.

The COURT: No objection is made.

Mr. FIELD: I am objecting. He has asked the witness to state the contents of the instrument and he has stated it. The witness has stated its contents—his conclusion.

The COURT: You asked him what it was and he told you according to his view, I suppose.

Mr. WOOD: I ask him now to state its contents and I consider it material for the record and believe the instrument is not in the record for the purpose of evidence.

The COURT: Of course, I will take time to find out for a certainty—to find out if it was.

Mr. MCMILLEN: It is not introduced in evidence.

Mr. MANN: We object to the witness reading the instrument in question as not proper cross-examination.

Mr. FIELD: And he has already stated the contents of it.

The COURT: I think it is not in evidence, it oug-t to be;
748 rather than the conclusions, and I will allow it to be read on that supposition.

Mr. FIELD: Exception.

Mr. WOOD: I refer to the instrument on pages 16 and top of 17 of the printed appeal book of the second trial and ask that it be read to the jury here.

Mr. MANN: I understand that we have an objection to an exception to the ruling.

Mr. FIELD: And this is done over our exception and objection.

The COURT: Yes.

Thereupon the evidence offered was read to the jury as follows:

"For and in consideration of the sum of One Dollar to me in hand paid by Joseph Barnett and for other good and valuable considerations received by me from said Joseph Barnett, the receipt whereof is hereby confessed and acknowledged, I do forever acquit and release the said Joseph Barnett from any and all claims for loss or damage accruing to me by reason or in consequence of the falling of the building on lot number two in block number 1 of the City of Albuquerque and I do hereby covenant and agree to and with the said Joseph Barnett for the consideration aforesaid that I will not on any pretense whatever bring, prosecute or maintain
749 any suit, action or demand against the said Joseph Barnett for any cause whatever growing out of the falling of said building or any part thereof or of any damage or injury accuring to me on account thereof, but I do hereby affirm and declare that all such damages have been by the said Joseph Barnett fully satisfied and discharged.

Witness my hand and seal this 23rd day of July, A. D. 1902.

JACOB WEINMAN. [SEAL.]

TERRITORY OF NEW MEXICO,
County of Bernalillo, ss:

Be it Remembered, that on the 26th day of July, A. D. 1902, personally appeared before the undersigned a Notary Public within and for the County and Territory aforesaid Jacob Weinman to me well and personally know- to be the person named in and who has executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

In Witness Whereof I have hereunto set my hand and seal the day and year last above written.

M. E. HICKEY,
Notary Public, Bernalillo Co.

Endorsed: "Filed in my office this Sept. 5, 1902. W. E. Dame, Clerk."

Q. When was it that you made that agreement with Mr. Barnett, if you know?

Mr. MANN: Objected to for the reason that the instrument shows for itself.

A. Previous to receiving the money for the lot?

Q. No; the date I want.

750 A. I do not know.

Q. Do you know whether or not it was executed on the day it bears date?

Mr. FIELD: What do you mean, is executed on the day it bears date?

Mr. WOOD: The agreement.

Mr. FIELD: I want to know whether it is, whether the release was executed on the day it bears date or whether it is what the witness said about making payment on the lot.

Mr. WOOD: No, I am asking about the release.

Q. Do you know whether or not the release was executed on the day it bears date?

A. I certainly think so.

Q. That is the 23rd day of July, is it not?

A. Yes, sir.

Q. Now, you say that you made a deed to Mr. Barnett on that lot about the same time?

A. I think so.

Q. And you signed that deed, didn't you, and your wife did?

A. Yes, sir.

Mr. MANN: This is objected to as not proper cross-examination.

The COURT: Overruled.

Mr. MANN: Exception.

751 Q. Now, have you any reason to believe that that deed was not executed on the day that it bears date?

Mr. MANN: Same objection: we did not ask him anything about this deed or when it was executed.

Mr. WOOD: I was under the impression you asked whether or not the one consideration did not cover both instruments.

Mr. MANN: We did ask that but what has that to do with the question of when the deed was executed?

The COURT: Objection overruled.

Mr. MANN: Exception: and it is objected to as incompetent, irrelevant and immaterial and not proper cross-examination.

Q. The question is, have you any reason to believe that that deed was not executed on the day it bears date?
A. I had no reason to.
Q. That is on the 25th day of July, was it not?
A. Yes, sir.

Mr. WOOD: That is all.

Redirect examination by Mr. FIELD:

Q. Look at this paper and state whether or not that is the first instrument you signed with relation to the sale of this lot to Mr. Barnett and the damages. (Counsel exhibiting a paper to witness.)

752 Mr. WOOD: I object to that as irrelevant and immaterial to the issue of this cause and the question — improper in form as it asks the witness to characterize it and tells its contents.
The COURT: This will be answered by yes or no.

A. It is; yes, sir.
Q. State, Mr. Weinman, whether at the time of the receipt of this money and the execution of this paper it was agreed between you and the representative of Mr. Barnett that you were to execute the deed and the release which you afterward executed.

Mr. WOOD: We object to that as calling for the conclusions of the witness and as leading and suggestive and also as irrelevant and immaterial to the issues of this case.
The COURT: You have not offered the paper and perhaps you do not propose to.
Mr. FIELD: I do propose to.
The COURT: Overruled.
Mr. WOOD: We except.
Mr. FIELD: I ask to have the paper identified.
Thereupon the paper referred to was marked defendants' exhibit 2 for identification.

Q. In whose handwriting is this instrument that has been
753 last shown to you (referring to paper marked exhibit 2)?
A. I don't know whose handwriting—the signature is mine.

Mr. FIELD: That is all.
Mr. MANN: That is all.
Mr. FIELD: I offer that paper in evidence identified by the witness marked defendants' exhibit 2 for identification.
Mr. WOOD: We object to the paper upon the same grounds as stated in our objections to the question.
Mr. FIELD: Very well: we will withdraw the offer (whereupon counsel Mr. Field took possession of the paper).

JAMES N. GLADDING, introduced as a witness in behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. FIELD:

Q. What is your name?
A. James N. Gladding.
Q. What is your business?
A. City Engineer, of Albuquerque.
Q. How long have you been city engineer of Albuquerque?
A. Three years and six months.
Q. How old are you?
A. Thirty.
754 Q. Where were you educated as an engineer?
A. Massachusetts Institute of Technology.
Q. When were you graduated?
A. 1906.
Q. Have you been practically ever since employed as the city engineer of Albuquerque?
A. Yes.
Q. Now, Mr. Gladding, suppose an adobe building to be one hundred feet in length with side walls eighteen or twenty inches thick and about eighteen feet high, resting on a stone foundation set a foot and a half or two feet in the ground, having a front of wood and glass, and the rear wall of the same material and description as the side walls; suppose this building to be covered with a tin roof, resting upon joists twelve inches wide, and having ceiling joists of the same dimensions, both sets of joists spanning the building and set in both side walls; suppose also that the floor of the building rests upon floor joists of the same dimensions which were also set in the side walls, and that the entire building was constructed on a lot where the soil consisted of a course of adobe earth two or more feet thick, which was underlaid with fine or gravelly sand; suppose also that on the lot immediately adjoining said building an excavation was made extending five feet along the length of the east wall of said building from the north corner toward the south for a distance of about five feet; suppose also that this excavation extended in a slanting way to a distance of from ten, fourteen or twenty inches under the foundation of said wall, and that
755 there was no other excavation under said wall, but there was a bench of earth in its natural state extending about three feet to the east of said wall immediately south of the excavation above described, and that said bench of earth was five feet in length from north to south, and immediately south of said bench of earth there was another excavation about five feet in length from north to south along but not under the foundation of said wall, which latter excavation was about five feet deep; suppose also, that part of the east wall of the building in question fell, and that before falling a crack appeared at the top of said wall at a point fifty-three feet south of the north end of said wall, and that said crack gradually widened during the period of from fifteen to thirty minutes

from the time it was discovered until the wall fell, and that immediately prior to the fall of the wall the crack had reached the width of about six inches on the top of the wall and extended down the wall in a perpendicular direction, so that it was about two inches wide at or near the foundation; suppose also that during the period that has been described, the front of the building moved perceptibly toward the north and that the wall slipped off the foundation and the bottom fell into the lot on which the excavation was made and top fell into the building under the roof: can you from your education, knowledge and experience as an engineer express an opinion as to whether or not the excavation which has been described as being under the foundation at the northeast corner of the
756 wall, caused the crack in the top of the wall which I have described?

A. Yes, sir.

Q. What is your opinion as to whether the excavation caused, or could have caused, the same said crack?

Mr. WOOD: To that we object upon the ground that it is incompetent; that the matter in question is not a proper subject for expert testimony; that the witness is not shown qualified upon the question of the substance of adobe, or as an expert to give testimony as to its physical properties, and that—that is all the objection.

The COURT: I think the qualification as to adobe is lacking.

Mr. FIELD: Who is to judge whether he is qualified as to adobe. He is giving his experience as an engineer, and from that experience and knowledge he can express an opinion upon that subject.

The COURT: I am not quite sure whether the question stated that the wall was adobe; did it?

Mr. FIELD: Yes, sir.

Mr. MANN: I think it is a matter for cross-examination.

The COURT: I do not think it makes any great difference whether it is done on cross-examination or now.

Mr. WOOD: So far as that goes we will be content to use
757 the right on cross-examination, without asking for it now—that is as to the further qualification of the witness.

The COURT: Then I will overrule the objection, because that is the only ground I would sustain it on.

Mr. WOOD: We save an exception to your Honor's ruling.

A. It could not.

Mr. FIELD: That is all.

Cross-examined by Mr. WOOD:

Q. From what source, Mr. Gladding, do you gain your information in regard to the tensile strength and the physical properties of building material, which qualifies you to express an opinion as to their qualities?

A. I personally made tests on all other building material except adobe and as far as I know there are no published tests, or any tests made on adobe itself.

Q. You never then have studied from books as to the physical properties of the building material known as adobe, have you?

A. No, sir.

Q. And you never have by tests conducted by yourself, outside, of your knowledge in books gained any knowledge as to its properties, have you?

A. No, sir.

Q. The answer to the question which has been asked of you would depend considerably upon the tensile strength of adobe
758 and also its flexibility, would it not?

A. It would depend upon the tensile and compressive strength.

Q. And as to those, too, you have never made any experiment yourself to determine, have you?

A. No.

Q. Or you never have read of any similar experiments made by anybody else, have you?

A. No.

Q. Would you claim to be better qualified to express an opinion as to the physical properties of the building material known as adobe than the native people here, for example, who have used it all lifetime?

A. I think I would.

Q. You think you would: now the question, Mr. Gladding, called for how much of an excavation under the front end of the wall, as you recollect it and on the basis of which you answered it.

A. The excavation—to be five feet long, parallel to the wall.

Q. And did it include an excavation under the wall, as you recollect it?

A. A short ways under the wall.

Q. How far under the wall?

A. A few inches.

Q. You do not remember how many?

A. No, sir.

Q. And you did not have in mind how many when you answered the question?

A. My answer would have been the same if it had gone away under the wall.

Q. Clear under?

759 A. Yes, sir.

Q. Would your answer have been the same had there been two successive excavations under the front end of the wall, each of them approximately five feet in length and extending substantially, or quite, under the wall, with a mere pier of dirt between, four or five feet in length.

Mr. FIELD: Objected to as an hypothetical question not based on any evidence in the case: there is no evidence of any second excavation under the wall.

Mr. WOOD: There is such evidence, but that is outside the point. I am cross-examining an expert witness.

The COURT: Overruled.

Mr. FIELD: Exception.

A. It would change the conditions.
Q. Your answer might then be different?
A. Yes, sir.
Q. Now, Mr. Gladding, if we assume that an excavation of five feet in length was made under the front end of that wall, the tendency would be for the front end of that wall to bend and drop into the excavation, would it not?
A. It would.
Q. And as dropped in the tendency would be for the top of that wall to move forward, would it not?
A. The top of the wall would not move forward until the wall started to *fail* (fall).
Q. No, that is true, but my point is and my question, when the wall did start to fall into that excavation, the physical effect would be to draw the top of the wall forward, would it not, toward the street?
760
A. It would—the tendency would be for the wall in front of the plane of rupture to fall into the trench.
Q. That is not my question. What I am asking you is, would not the tendency of the front end of that wall to fall into the excavation—would not the physical effect of that be a tendency to move the adobes on top of that wall forward for some appreciable distance along the top.
A. It would.
Q. And would not the tendency be to move those top adobes forward, back to a point where the strain of drawing them forward was greater than the tensile strength, so as to break them at some point back there, in drawing forward.
A. It would.
Q. Now, the distance back from this break—that that crack would occur, due to this strain, would depend entirely upon the determination of the tensile strength of the adobe, would it not?
A. That would be one feature.
Q. Yes; now by tensile strength we mean their ability to resist tearing apart—that is what we mean, by tensile strength, is it not (counsel tearing a piece of paper)—or pulling apart?
A. Yes, sir.
Q. Now, you have answered the question that it could not, partly upon your belief that the tensile strength of the adobes was not sufficient to carry a strain from this front end of the wall back 53 feet, is that right?
761
A. Yes, sir.
Q. Did you understand that the question involved two sets of joists, one above the other, near the top of this wall, projecting into or through the wall?
A. Yes, sir.
Q. And did you understand that the upper layer of those were fastened together by a sheet of tin nailed to each, constituting the roof?
A. I did not know about the tin but the answer would be the same.

Q. Well, I have not ask- you about the answer yet: we will come to that later: you did not know about the tin?
A. No, sir.
Q. Didn't you hear Mr. Field in his questions say that there was a tin roof fastened to these upper joists?
A. I just understood from that question that the tin was in the adobe.
Q. Was in the adobe?
A. No, I don't mean that.

The COURT: Boards first—then tin——
Mr. WOOD: I do not recollect that Mr. Field's question involves that.
The COURT: I do not know whether his question did involve that. I thought Mr. Field was trying to have his question cover the conceded facts.

762 Q. You did not have in mind in answering the question that these roof joists had boards nailed across them and then tin nailed to the boards?
A. Yes, sir.
Q. You had that in mind?
A. Yes, sir.
Q. And then did you know that the lower set of joists to which the ceiling was fastened also projecting through the wall or into the wall—not quite through it—was fastened at the ceiling by boards running lengthwise in this building, nailed to each?
A. Yes, sir.
Q. Now, Mr. Gladding, the effect of the roof boards nailed from joist to joist with the tin upon them, and the effect of the ceiling boards nailed from joist under, would be to very greatly increase the tensile strength of the upper part of that wall, would it not, when resisting a strain drawing endways against it—tend to keep it together and tend to transfer the strain back along the wall?
A. It would not.
Q. You would say it would not, and would it weaken the tensile strength, Mr. Gladding, of that wall?

Mr. FIELD: I object to the expression, tensile strength of the wall—tensile strength of the material of the wall may be a subject of inquiry.
The COURT: That would be a matter to be corrected by further cross-examination or by statement of the witness, if he ob-
763 jects to characterizing it that way—he can say so.
Mr. FIELD: We except.

A. The adhesion of the adobe and wood would be less than adobe and adobe?
Q. Well, Mr. Gladding, did you understand that these joists, whatever they are—assuming this to be the wall (counsel exhibiting card or paper to witness—did you understand that those joists are right down there, imbedded in the wall and then nailed together—in my question?
A. Yes, sir.

Q. If the tendency of that wood was to slide forward, will you explain to us how it could slide over the wall when it is firmly embedded in it?

A. The adobe and wood could separate the same as adobe could separate from adobe in any part of the wall, if the stress is large enough.

Q. Well, Mr. Gladding, if you would hitch onto the front end of that roof by fastening to its sleepers, and at the same time hitch on to the front end of these joists upon which the ceiling was nailed, and draw both of them forward toward the street, all that part of the wall above them would have to come, too, would it not?

A. It would.

Q. Well, is not that tendency to come to, the tensile strength of that wall on top?

A. I do not understand that question.

Q. Is not that tendency of the wall to move forward when bound together by all that lumber—does that not contribute
764 to the tensile strength of that wall when pulling forward on the top off it?

A. Yes, sir.

Q. Certainly it does; now did you understand me before when you said that the position of that timber and the fastening of the roof and the ceiling to it, would not in any way affect the tensile strength of the wall as a whole—when moved or pushed forward at the top?

A. It would affect the strength of the wall.

Q. Certainly it would; and it would move that point where the crack would occur from the point forward, of the wall, that you have described, back a considerable distance from what it would be, would it not?

A. It would not.

Q. That is, the wall would break just as close up to these cracks, from bending, if you did not have all these rafters running through it bound together by boards—it would break just as close up to the top as it would were these board- not there, that is your opinion?

A. Yes, sir.

Q. Well, the tin and the boards would have to bread at the same time in order for those adobes to stay behind, at the point where the wall cracked, would they not?

A. Not necessarily.

Q. The adobes could move ahead and leave these boards behind—can you tell us how they could get around the ends——

A. As I understand the conditions of that wall——

Q. But take the condition as I have given it to you, re-
765 gardless——

A. I cannot understand it.

Q. I am asking you about the conditions that I have given you.

A. (Witness does not answer.)

Q. Now, Mr. Gladding, suppose it appeared that that whole roof and the ceiling, too, had moved forward clear back to this crack that has been spoken of when the wall fell——

Mr. FIELD: I object to that because it is apparently an hypothetical question not based on the evidence in the case.

Q. (Con.) Would not that fact conclusively show to your mind that the whole top of that wall did move forward back to the crack?

The COURT: Objection overruled.
Mr. FIELD: Exception.

A. Yes, sir.

Mr. WOOD: That is all.

Redirect examination by Mr. FIELD:

Q. Mr. Gladding, is there or not the proposition of engineering science or physics which conclusively determines the question of where the strain on a wall would come first, in the conditions described in my question?
A. Yes, sir.
Q. Where would that strain come?
A. The wall would fall where the maximum bending room had occurred.
766 Q. And where would that be with reference to the plane of rupture?
A. They would coincide.
Q. Now I do not know that the jury can be made to understand that but can you not in untechnical terms indicate where that point would be in the case supposed by my question?
A. That plane would be directly over the edge of the embankment or the excavation, providing there was no movement of that bank.
The COURT: I suppose he means the south edge—there are about three edges to that excavation.
A. Well, that edge, that would be the fulcrum over which that beam would be active.

Redirect examination by Mr. WOOD:

Q. Now, Mr. Gladding, an adobe wall you understand is composed of adobe blocks of the dimensions of about 3x18—4x16x8, and that the wall is built up of these adobes like bricks, each layer overlapping the crack of the preceding layer?
A. (Witness does not answer.)
Q. Can you tell us, Mr. Gladding, assuming the wall to have been of the dimensions given by Mr. Field, what weight was added to the balance of that wall, approximately, by the removal of 5 feet of the support under the forward end of the basement—or of the foundation?
A. I do not just understand what you mean by weight there.
Q. I am using the word in the ordinary sense.
A. There was no more weight put on the wall there by movement that foundation—there was the same weight coming down on
767 to the floor and from the roof——
Q. Well, when you take a wall and remove 5 feet of the

support from the front end of it, you have added to the support which the rest of the wall is bearing, the weight of this 5 feet and whatever else it supports, up to the time this 5 feet breaks off and falls, are you not?

A. Yes, sir.

Q. Now, then, when you remove that 5 feet of support under the front end of that wall—and I am assuming that wall to be of the dimensions given by Mr. Field—tell us approximately if you can how much weight—additional weight—the rest of this wall is supporting than it was when the front 5 feet had something under it?

A. I am unable to tell.

Q. Why; that is capable of an accurate computation, is it not, to any person who knows the weight and the properties of clay?

A. If you know the weight of the roof that is coming on there, too, and the floors——

Q. Well, give us the weight of the wall over that excavation if you can, excluding the weight of the roof and the floors?

Mr. FIELD: The wall is 18 inches thick, 18 feet high.

Q. And 5 feet back.

A. (Witness making calculation.)

The COURT: I think I allowed a question a moment ago to which Mr. Field objected as assuming a proposition which was not in evidence, I think now that should be changed——

768 Mr. FIELD: I will withdraw my objection to that question.

Q. I mean, Mr. Gladding, the front part of the wall.

A. (Con.) I should judge about 13,500 pounds.

Q. Now, Mr. Gadding, if that wall were from the bottom of the basement to the top of the wall—were 22 feet high instead of 18, how much then would it make?

A. (Witness makes calculation.)

Mr. FIELD: Nobody has testified that the wall was 22 feet according to my recollection, but if the gentleman wants to test the witness's ability to make the calculation, he can go ahead.

Q. Did you understand my question to include the stone foundation about 8 feet below the bottom of the wall?

A. No, sir.

Q. Then, add that weight, Mr. Gadding, if you will—3 feet of the foundation.

Mr. FIELD: I object to that because the testimony is that that fell before the wall fell—separated from the wall.

Mr. MCMILLEN: I know of no such testimony as that.

The COURT: You mean that part—over the excavation?

Mr. FIELD: That that fell into the excavation before the wall fell.

769 A. I do not know what kind of a foundation was there.

The COURT: There was testimony that it was lying there intact in the excavation.

Mr. Wood: That was after they took the wall out and I think one witness said in the first place a stone dropped——

After discussion.

Mr. Field: I do not care about it for the purposes of this question. I will withdraw the objection and he can include the weight of the foundation.

Q. Assuming the foundation to have been of red sand stone and mortar, 3 feet high and about 5 feet long, and, say, 18 inches thick——

The Court: Is there any evidence, Mr. Wood, that the wall and foundation were physically connected except by contact—that they formed part of the same mass?

Mr. Wood: I think the only conclusion would be that the whole thing is made up of a stone, clay, adobes, and mortar from top to bottom—the first three feet stone and from there on up adobes—I think that is a fact.

Mr. Field: I do not believe there is any testimony on this trial as to how the adobes were laid but I am perfectly willing that they may assume, for the purposes of cross-examination, that they were
770 laid any way they want them.

The Court: I do not think the testimony connected the adobes with the foundation, and Mr. Wood is now assuming that the weight of this stone foundation was tacked to the other, whereas I do not think that any witness testified that the adobe wall and the foundations were at all attached to each other.

Mr. Wood: There is evidence that they dug out 5 feet under the foundation at the front end of the wall and that had been dug out for some time before the foundation and the wall fell.

After argument:

The Court: I understand they do not object to that question and if they do not, the Court is not going to.

Mr. Field: Personally, I do not care how they attach these things.

Q. I would like to get the weight from the bottom of the foundation to the top of the wall, over that 5 feet of space.

Mr. Field: Of course, I make the objection that this is not proper cross-examination——

The Court: Objection overruled.

Mr. Field: If I may be allowed to go into the question of their weights myself.

Q. Can you give it?

A. In that first case the 18 feet wall, about 17,000 pounds.

771 Q. And if the wall were 22 feet from bottom to top, how much?

A. Nearly 20,000 pounds.

Q. Now, Mr. Gladding, if there were another unsupported space of 5 feet in length further south from this first one, with an intervening pier of dirt of three or four, say five feet in width, between them, how much additional weight would be added to the wall by reason of both those excavations that I have mentioned?

Mr. FIELD: I object to that evidence because there is no evidence that there was any other unsupported place.

Mr. WOOD: Mr. McCorriston certainly so testified.

The COURT: I think he said he could not see.

Mr. WOOD: I think your honor is mistaken—he testified the second excavation was under the wall, the same as the first.

The COURT: Of course, I cannot be sure about that.

Mr. WOOD: I am very clear he did so testify.

The COURT: I cannot say he did not, for a certainty, therefore he may answer the question.

Mr. FIELD: Exception.

A. Are you assuming now that the excavation goes clear under the wall?

772 Q. Yes.

Mr. FIELD: Now I insist that the witness be not allowed to answer the question because it is certainly not true that any witness said the second excavation went clear under the wall.

The COURT: I will sustain the objection.

Mr. WOOD: Exception: That is all.

Redirect examination by Mr. FIELD:

Q. The principle about which I asked you on redirect examination as to where the failure of this wall would occur would be the same without regard to the material of which the wall is composed, would it not?

A. It would make no difference.

Q. Now, Mr. Gladding, tell the jury the weight of the wall between the 5 foot point where you have given the weight in answer to these questions and the 53 foot point back where the crack occurred—on the three bases—it is the same question exactly—you would have 48 feet of wall now in place of 5 feet, with the foundation in and with the foundation out: I want you to make exactly the same calculations that you made for counsel for plaintiffs.

A. (Witness proceeds to make calculations.)

Q. The 48 is 9-1-3 times 5 and the weight would be 9-1-3 times the weight given, in answer to the question, would it not?

A. Yes, sir.

773 Mr. FIELD: That is all.

Recross-examination by Mr. WOOD:

Q. Now, Mr. Gladding, you stated to counsel your answer would be the same—that is, as I understand you, the wall would break at the same point under those circumstances, no matter what material it was composed of.

A. Yes, sir.

Q. Did you mean that?

A. Yes, sir.

Q. Why, if that wall were composed of planks laid lengthwise instead of adobe brick, would not its tensile strength be greater and

would it not tend to push the place of the crack further back, assuming there was a weak spot further back?

A. The line of rupture would seek the line of least resistance but there would be very little variation in that line.

Q. So, whether it was iron, rubber, or adobe, the rule would be no different: is that right?

A. It would in any elastic body—I question about the rubber——

Q. Every solid body is elastic to some degree, is it not?

A. To some degree, yes sir.

Q. But rubber has only a greater degree of elasticity——

A. No, I disagree there—rubber is the least elastic.

Q. Rubber is the least elastic?

A. Yes, sir.

Q. Even less so than adobe?

A. It is less so than steel.

774 Q. Well, how about adobe—you said it was the least elastic, did you mean it?

A. I do not remember saying that adobe was the least elastic material.

Mr. Wood: I thought I heard you say it; probably I misunderstood you—you meant that it was less elastic than steel.

A. Yes, sir, less elastic than steel.

Mr. Wood: That is all.

Mr. Field: That is all.

Mr. Field: Now, we desire to read the testimony of Mr. Culloden, with your Honor's permission, we will let Mr. Jamison do it.

This is the testimony of this witness on the trial of this case which took place last December. Thereupon the following was read to the jury:

William Culloden, introduced as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Mann:

Q. State your name to the jury?

A. William Culloden.

Q. Where do you reside?

A. I reside now in Senorita Canyon, Sandoval County.

Q. Where were you living in the month of June, 1902?

A. In Albuquerque.

775 Q. Do you remember the occasion of the wall of the building occupied at that time by Mr. Ruppe falling down?

A. I do.

Q. Where were you on that day, Mr. Culloden, if you remember?

A. I was standing on the corner of Central avenue and Second street—on the east side—east corner.

Q. And what time in the day was that, Mr. Culloden, if you remember?

A. I cannot rather remember exactly the time it was, but I know

it was one afternoon, if I am not mistaken I think it was one afternoon.

Q. Were you standing there at the time that the wall fell?

A. I was standing on the corner before the wall fell.

Q. And how long before, Mr. Culloden?

A. Oh, about twenty or twenty-five minutes, or a half an hour—something of that kind.

Q. How long had you been living in Albuquerque prior to that time?

A. About twenty-six years.

Q. State whether or not you were familiar with the building that occupied the Barnett lot and the building in which Mr. Ruppe's drug store was situated?

A. Yes sir.

Q. How long had those buildings been standing there so far as you know?

A. The building where Mr. Barnett was there was put up there before I came to Albuquerque, and I think the Weinman
776 building was built afterward—after the corner of the Barnett.

Q. I will ask you to state whether or not the building had been removed from the Barnett lot at the time the wall fell?

A. The most part of the building.

Q. From where you stood at the corner of Second street and Railroad avenue, state whether or not you could see the east wall of the Ruppe building, or rather the building occupied by Mr. Ruppe?

A. Yes; I could see it.

Q. Had you observed that wall before?

A. Yes, sir.

Q. I will ask you, Mr. Culloden, to describe to the jury the condition of that wall, as you saw it?

The Court: The east wall?

Q. The east wall of the building occupied by Mr. Ruppe as you saw it?

A. When I see it, of course it was only part uncovered—it was from the north corner to the south corner about may be sixty or seventy-five feet that was discovered, and from that part you know to the south the whole Barnett wall was existing yet—was not entirely down.

Q. Now what time was that you now refer to?

A. About day before the wall fell or something of that kind—I was passing there every day.

Q. Now I wish you would describe the appearance of that wall to the jury?

777 A. All I could see on that wall was—was part from the north corner—was practically straight but not plumb, for about twenty-five feet, you might say; from those twenty-five feet to the south it was big part of it—of the wall twisted—big bump on it, and then on that same part it looked to me that at that time at that same place that wall was not plumb from eight to ten inches—might be from six inches to ten—might be, where the bump

was—might reach ten inches—then that would run there—near over where it was a big crack open down in the wall, and from that crack where the wall was cracked little farther down it looked the same to me that the wall was all right.

Q. Explain to the jury what you mean by the wall not being plumb?

Q. Well, instead for that wall practically straight up and down it fall on one side, and the wall was f-ail you know on the east side.

(NOTE.) Witness speaking very broken English.

Q. Now state to the jury which way the wall leaned out of plumb?

A. The east side.

Q. Suppose you take one of those books, Mr. Culloden——

(NOTE.) Witness picking up reporter's flexible note-book.

THE COURT: That is not stiff: you better take this one.

(NOTE.) Handing witness stiff-covered law book.

778 Q. (Cont.) and indicate to the jury what you mean by the wall being out of plumb, and show as near as you can the condition of the wall by the book?

(NOTE.) Witness illustrating with Session Laws.

Mr. WOOD: We object to that on the ground that it is a cross-examination of their own witness—that the witness' testimony is perfectly clear on that point and requires no illustration—that he has stated how much it was out and which way it leaned, and we submit no further illustration can aid that.

THE COURT: He has not perfect command of English, and I conclude it is not his native tongue, and there may be some question if he is fully understood by the jury: I will let him show, and over rule your objection.

A. Well, I mean by wall not be perfectly plumb—that is one thing standing perfectly straight up and down instead to incline that way (Witness illustrating) and what I mean twisted—(Witness illustrating with reporter's flexible note book) if you take a wall perfectly straight that way and if you get it that way—on the east side, of course there is a big bump in the center (Witness illustrating by bending book)—and the other side—one side is perfectly straight that way, and it come on certain point to be round up that way—then the incline on the east on that bump—(illustrating) that is as far as I could see the wall was.

779 Mr. WOOD: We desire an exception to the former ruling and also further object on the ground that the illustration as shown by witness, with a flexible book is inclined to mislead as to the nature and extent of the bulge or bump described by the witness.

THE COURT: Go on.

Q. You spoke of a crack in that wall——

THE COURT: You can put that book back.

Q. State to the jury when you first observed the crack in the wall?

A. About day before or that same day, especially when I see that the ground was coming down from the north corner.

Q. And how far back from the corner—about how far, as near as you can tell, was this crack that you have described?

A. Well, if I am not exactly mistaken I do not know exactly for sure—it looks to me that it was sixty feet or a little over.

Q. I will ask you, Mr. Culloden, to state to the jury whether or not you saw the wall fall?

A. Yes sir.

Q. Now describe to the jury as near as you can just what you saw at that time?

A. I stepped out from the corner of the Second street to talk to a certain man that were working in the foundation there, that I want to see an account of my business—when I come right on the north corner of the building and when I was talking to those people
780 working down in the foundation I heard some ground fall inside the—of the front of Mr. Ruppe's store, and then I turned around and it was somebody around me—I do not remember exactly who it was—I said you better go inside and tell Mr. Ruppe come down, because I am sure that wall will fall—I know that somebody went in, and in very short time he come out of his store and went clear to the center of Central avenue and was looking at it himself—when he was near to get in again the wall by that time just come down flat.

Q. Now can you describe to the jury how the wall fell as you saw it?

A. Yes sir.

Q. Will you please do so?

A. When it start to fall it start right away where the wall was twisted, and then the wall kind double out right where the big bump was—then when it start to double out (illustrating with hand) the weight of the roof on the top, of course that part went out—come down right to the corner, you know, at once.

Mr. MANN: That is all.

Cross-examined by Mr. WOOD:

Q. Mr. Culloden, you are of French descent, are you not?

A. I am native Frenchman.

Q. How long have you known Mr. La Driere, the man who had that work in charge?

A. Well, I knew him couple of year before he had charge of that work I guess.

781 Q. Had you not known him longer than two years before that time?

A. Might be a little over two years—I do not know exactly.

Q. Have you not known him for four or five years before that time?

A. Not that long—might possibly be four years, but not over.

Q. You and he, he is also of French descent, or a native Frenchman, is he not?

A. I do not think so.

Q. You think not?

A. I do not think so.

Q. You and he are and have always been good friends, have you not?

A. Well, we never had any dispute.

Q. You have had many an occasion where you could have—you have been good friends?

A. I have kind of get in dispute when I plastered his house—but we didn't fight.

Q. What was your business here at that time?

A. My business was plasterer—contractor—always been until last March.

Q. You followed that business here until last March, did you?

A. Yes, sir.

Q. Before that and since then you have had many contracts in works superintended by Mr. La Driere, have you not?

A. Some, yes.

Q. And as a friend of his you would be willing to do anything in reason to help him if he got in the hole, would you not?

782 A. I do not know—when it comes to his own business on work—or do something to satisfy him—I guess I will—I would not do it right today——

Q. Now, if I understand you correctly, the first you noticed—the first thing that called your attention to the fact that the wall was about to fall you say you heard some adobes or dirt fall on the floor of the drug store inside—is that what you stated?

A. Right on the corner—on the corner of the window—kind of wooden posts, you know, to hold the front—and I was standing right in the corner there and I heard the ground fall on front of the bench of the window.

Q. What corner were you standing on?

A. On the north corner.

Q. North corner of what?

A. On the corner—on the east corner of the building from—on Railroad avenue—Central avenue—it is north corner—it is east corner.

Q. You were not at the corner of the street then, but you were at the corner of the building?

A. Right at the corner of the building at the time that the wall fell.

Q. You were in front right in that position on the sidewalk where some of the adobes afterward fell out, when it did fall?

A. I was right standing on the sidewalk, certainly.

Q. About that position where some of the adobes afterwards fell?

783 Mr. MANN: We object to that because the witness has not testified that any one of them did fall on the sidewalk.

THE COURT: I think you rather assume that he did say so—it may lead to confusion afterward—you may as well make it clear whether he means that himself or not.

Q. Were you in front of the building or were you on the east of it when you were standing there at the time you first noticed that the wall was giving way?

A. I was right near of the north corner of the Weinman build-

ing—on the sidewalk—standing and talking to a man that was working down in the foundation.

Q. Well, what I am getting at—perhaps your answer makes it clear, but I wish you would clear it up a little more; were you to the west or to the east, be it ever so little, of the east line of the Ruppe wall, where you were standing?

A. Oh, I might be two or three feet from the east.

Q. Would you say that in your best judgment you were not more than three feet to the east from that corner?

A. It might be little more than three feet—I cannot tell exactly—say exactly three feet—three feet and a half—might be four feet—I know that I was standing on the east side.

Q. You were there talking to some man?

A. I was.

Q. Where was he?

784 A. He was working down in the foundation.

Q. In the bottom of this excavation?

A. Yes, sir.

Q. And how near was he working to the Ruppe wall?

A. Well, it was some mason working there you know, about two feet or three feet from Ruppe's wall—some time—nearly two feet—some times four or five or six feet from that—working in and back you know, getting material.

Q. You say he was getting material?

A. Well, yes.

Q. And was he laying it in that wall?

A. Well, they were laying part of the Barnett foundation there in that time.

Q. Well, I know that, but confine your attention to the man I asked you about whom you were talking with, was he laying material in the wall at the point where you were standing talking to him?

A. No, he was not right on the corner—he was little farther away, but I could talk from where I was—I could talk with him—he was standing may be ten or fifteen feet from me.

Q. Was he laying material in that north wall?

A. Mason—stone mason—yes, sir.

Q. And you stayed at that point where you have designated talking with this man?

A. Most of the time I was standing there, yes.

Q. And the first thing to call your attention to any danger was the sound of falling material right there at that corner?

A. Yes, sir.

785 Q. Now, did you see that material falling?

A. Why, I did not see anything fall inside except a little dirt, you know, that was standing near the post on the north corner of the wall—on the inside.

Q. I do not know whether I understand you correctly or not; do you mean to tell us that you from your position outside saw dirt falling inside of the store?

A. Well, I heard them—of course that is what called my attention, because I heard it falling.

Q. But you didn't see it?
A. No.
Q. Then you looked up and you saw some dirt fall along that post, I think you said?
A. Inside.
Q. Inside?
A. Yes, near the glass, on front.
Q. Where did you go; did you move from the spot where you were standing in order to see it fall inside?
A. Of course I did.
Q. Well, where did you go?
A. I just went and looked at it—what was the matter.
Q. Then when you heard it fall inside you walked those three or four feet—whatever it was—you were on the east of the building and got down in front of the building to see it falling inside, is that the idea?
A. Yes, sir.
Q. And was it that time or that point that you called somebody's attention and asked him to go in?
786 A. Yes, sir.
Q. Did you notice whether the front of the building was moved as you walked over there to see what was falling inside—did you notice the front sway or move?
A. No, sir.
Q. How long a time elapsed from the time when you first heard that dirt or bricks falling inside until Mr. Ruppe came out of the store as you have testified?

Mr. MANN: I do not think he said anything about observing bricks there——

A. Might be fifteen or twenty minutes after.

The COURT: Did you mean to object?
Mr. MANN: I do object—I object to his putting the word bricks into the witness' mouth.

Q. You know what I mean when I speak about the brick in this wall——

The COURT: No, I think there is nothing about bricks.
A. No brick at all fell in there—I saw some dirt.
Q. Did you ever hear of such a thing as an adobe brick?

The COURT: I do not think it is worth while to take time with that. Why do you want to get that word in when it is not in?
Mr. WOOD: I want to use the word because I understand
787 that is the correct name for them—we are coming to those adobe bricks and I do not know what else to call them.
The COURT: I do not think it has been used in that way by any witness in the case.
Mr. WOOD: That is possible.
The COURT: It just brings in a word that has not been used at all as I recollect it.

Mr. Wood: I will adopt any other word your Honor suggests.

The Court: Adobes, I believe the witnesses call it—I do not think they have spoken of anything else but adobes.

After further discussion:

Mr. Wood: I will exclude the word brick from subsequent questions.

Q. How long did you remain looking in at the window when you walked to the front?

A. I didn't stay there long because——

Q. But tell us how long, one, two, three, five or ten minutes; give your best judgment?

A. It might be five, might be three minutes.

Q. What did you see happen inside of the store while you stayed there?

A. I didn't see anything but the dust, you know, falling from the roof down near that wooden post.

788 Q. That was right there to the front next to the window?

A. Yes, sir.

Q. And did you ask this party to go in and warn Mr. Ruppe before you walked to the front of the window or afterwards?

A. After.

Q. What is that?

A. After I went to see what was the matter you know I called somebody to go and tell somebody to go tell Mr. Ruppe to come out.

Q. And while this party went in to tell Mr. Ruppe did you continue standing in front of the window?

A. No, sir.

Q. Where did you go?

A. I went about five or six feet on the east side—may be a little more, to tell some working men that were digging dirt there pretty near in front of where the wall was the worst—to tell them to work a little farther down, and that is the time that I told those people to go to work a little farther south that I told somebody to go to tell Mr. Ruppe to come out.

Q. Now, let us see if I understand you: you came out to tell the workmen who were working next to the wall to go away because you feared that the wall was about to fall; is that the idea?

A. That is what I did.

Q. And I presume you wanted to get away yourself because the wall was about to fall, didn't you?

789 A. And that is what I did too.

Q. You didn't consider the position you occupied in front of the window to be a particularly safe one just at that time, did you?

A. No. (Witness' answer drowned by laughter.)

Q. How is that?

A. Still it was not any danger for me because I was standing on the sidewalk and the wall would not catch you there.

Q. You were standing until you moved, but you moved particularly because you thought the wall might fall out there, did you not?

A. Certainly—I moved especially to tell those people to go and work a little further up.

Q. And you say you went five or six feet from the corner you think to the east where you told those men?

A. Yes, sir.

Q. Now, from the time you left that point in front of the window you kept your attention on those men until you saw that they heard you and moved out of what you thought was danger, I presume, did you not?

A. No, sir; I didn't pay no more attention to them any more.

Q. You paid attention to them until you saw that they heard you and moved?

A. Yes, sir.

Q. How many men were working in there if you remember at that time?

A. That would be pretty hard for me to tell exactly how many—I do not remember exactly.

790 Q. Your best judgment?

A. About two masons worked there, standing there—a little stone work——

Q. Just the number, give your best judgment as to the number?

A. About eight or ten.

Q. Close to the wall that you told them to get away from?

A. There was ones that I told to get away.

Q. Yes—those are the ones I mean?

A. There were about four or five—they were working with shovels digging dirt there.

Q. Now, did you notice Mr. Ruppe when he came out of the store?

A. Yes, sir.

Q. Where were you standing when Ruppe came out of the store?

A. Right on the same sidewalk where I was.

Q. About how far away from the corner?

A. Oh, might be ten feet—might be less.

Q. Your best judgment, how close were you—I would rather if you would give me a figure that you say your best judgment is as to how near you were?

A. I do not think I could be more than about ten or twelve feet from the corner.

Q. Were you at the same place where you say you were when you warned those men to leave?

A. No, sir; I was further east.

Q. You moved—started away—why did you move farther east—were you still afraid of that wall?

A. I did not have anything else to do any more and I

791 did not want to stand there.

Q. And if I understand you correctly you say at that time when Mr. Ruppe came out of the building he walked over toward the center of the street, away from the building, and almost immediately after the wall fell?

A. Very short time after he came out, yes, sir.

Q. A matter of one or two minutes?

A. More than that.
Q. Well, how much?
A. Might be fifteen or twenty minutes.
Q. After he came out before the wall fell?
A. No; before the wall fell—was about fifteen or twenty minutes before the wall fell that Mr. Ruppe came out from the store—before——
Q. Did Ruppe go back in the store after he came out that time?
A. I think he did but I am not poitively sure.
Q. What was he doing in the meantime?
A. At that time?
Q. Yes—between the time he came out of the store and the time the wall fell?
A. Well, I did not pay my attention to him you know—I know he was there and that he was looking at the wall, if it was going to stand or fall, because he — been standing on the street—I did not pay attention if he went in the store or if he kept looking at the wall.
Q. Did you hear the glass crack and break in that front wall as the wall began to sag there and go down?
A. No, sir.
Q. You didn't hear that?
792 A. No, I didn't hear that.
Q. How much dirt or adobe fell in the front of that wall at the time when your attention was first called to it?
A. Well, my first attention—I think that when I heard it it was just only dust that fell down near—in the corner—dust—just enough to cover the board—it was enough you know so I could hear it.
Q. You stated in answer to counsel's question, and if I understood you correctly, concerning that crack in the wall, that fifty, sixty or seventy feet as the case may be, that you saw that crack the day before, is that true: did you mean so to state?
A. Yes, I did.
Q. You saw it the day before?
A. Yes, sir.
Q. Will you describe its appearance the day before?
A. Well, when I see the crack it was quite an old open crack there just big enough to pass my fist through on certain places.
Q. Tell us in what places that crack was big enough to put your fist through the day before?
A. Well, about, may be six or seven feet up above the ground—you might say about the middle of the wall, you know, up and down—about the center.——
Q. And how big was it at the top—could you get your fist through in that?
A. I did not try it but I think I could.
Q. Well, did you try it at the bottom?
A. No, sir.
Q. Then, you didn't try it either top or bottom, did you?
793 A. No, sir.
Q. Did that crack extend clear from top to bottom the day before?

A. Yes, sir.
Q. Did it go through the foundation?
A. I cannot tell because I could not see the foundation.
Q. Why could you not?
A. Because I am never been near enough.
Q. Did you have to get any closer to the building to see the wall than you did to see the foundation or to the foundation to see the wall?
A. No, sir, but I never did see any foundation—if there was any it was under the ground.
Q. Why don't you know, Mr. Culloden, that that foundation extended above the ground some distance all the way along and was in plain sight ever since the Barnett Building had been torn down: didn't you know that?
A. No, sir; I did see the wall but I did not see the foundation.
Q. Well, are you perfectly sure that that foundation was buried beneath the surface of the ground?
A. If it was any it must be because I do not remember having seen any.
Q. Well, you have testified that there was not any there—do you mean that——
A. I do not know if it was any or not; I say I did not see any.
Q. Well, then, what is your opinion now as to whether that crack extended to the foundation?
A. My opinion is that it was in the foundation—if there was any—it showed up near the foundation—if there was any foundation.
Q. Was it apparently about the same breadth or was it broader from top to bottom—this crack, through the wall?
A. I do not think so.
Q. Well, do you know?
A. Because I see it.
Q. You say you don't think so: now, I want to know what you know about the crack?
A. I will say that the opening was a little larger on the top than it was on the bottom—may be a little less in the center.
Q. A little less in the center?
A. When it comes near the ground there it was still less.
Q. Now, you have already testified that about up to where you could reach it was big enough to put your fist through?
A. Yes, about six feet high.
Q. If it was bigger than that up near the top of the wall how big was the crack at the top of the wall the day before the building fell?
A. Oh, it was—might be inch or two or little larger at the top than it was on the center as far as I could see.
Q. And that was some fifty or sixty feet back from the sidewalk?
A. I think very near sixty feet.
Q. Well, where were you when you were looking, in estimating its width?
A. When I see it I see it from the front side of second street.
Q. Where?

A. Right on front—looking west.
Q. Where?
A. I was standing on Second street looking at the wall on front—that would be about twenty-five or thirty feet from the wall.
Q. Directly in front of the wall?
A. Yes, in front of the wall.
Q. That was the first time you saw that crack was it?
A. Yes sir.
Q. Are you perfectly sure about that?
A. Well, I might see it before but I do not remember it because not having business there every day I did not have to stop or anything of that kind—I stopped to speak to people some time—that is the reason I could see it—I may be seen it before—I do not remember having seen it before.
Q. You have no recollection of ever having seen it before that day?
A. Not—I think I can't see it because the whole Barnett wall was not down yet.
Q. Well, how long had the Barnett wall been down far enough so that that crack could have been seen at that point if it ever existed.
A. I cannot exactly say—may be two or three days—in fact they were working there yet you know on back part of that same wall—tearing down one part existing yet.
Q. Will you say that the Barnett wall at the point where you say that crack was had not been torn down for two or three
796 weeks before the wall fell?
A. I do not think so.
Q. Will you say that it had not been: will you testify positively that that wall had not been torn down for about three weeks?
A. I cannot say positively but I have enough recollection for saying so.
Q. And did you pass that point every day along about that day?
A. Most every day, yes.
Q. Most every day, and the first time you can recollect this great crack, you can speak of is the day before the wall fell?
A. Yes, sir.
Q. Did it go through the wall, clear through.
A. Cannot tell—never been near enough you know to see it.
Q. Why, didn't you *see* in then to tell Mr. Ruppe to get out, wall was falling when you saw this tremendous crack?
A. Oh, I did not think it was my business—on the same place—there was no danger at that time I did not think.
Q. Did it seem to you that a crack of that size in that wall indicated any danger at all?
A. No, sir—I have seen the crack on a wall for ten years and that wall won't fall—if a wall is perfectly plumb it won't fall.
Q. But you had seen as you say that this wall was not plumb, did you not—or had you not noticed that fact at that time?
A. Didn't notice that fact before no.
Q. What—you had not?
797 A. No.
Q. When did you first notice that that wall was not plumb?

A. The same day that the wall fell.

Q. While it was falling?

A. Well, before it was falling—that is the reason why I called Mr. Ruppe out there.

Q. Did you ever notice that that wall was not plumb before you heard and saw the dirt falling down at the front end of it?

A. I might see it quarter of an hour before or ten minutes before—the time I went on that corner to see it—I could not see it on front unless I be on the corner.

Q. You have testified that you did see it; now I want to find out when it was that you saw that the wall was not plumb?

A. Fifteen minutes before I called Mr. Ruppe out—I was there on the corner—that is the only way I could see it—I got somebody——

Q. How often had you gone up and down Railroad avenue since that wall was torn away while they were working there?

A. Before they took the first wall down?

Q. No, afterward, between the time they removed the Barnett building and the time that this wall fell, how often did you pass that place in front of Ruppe's drug store?

A. It would be hard for me to tell.

Q. Every day didn't you a couple of times?

A. Couple of times every day I pass there on the corner, either Railroad avenue or Second street.

708 Q. On both, did you not?

A. I did not say that I was in front of Ruppe's store every day.

Q. That is what I am getting at; did you or did you not?

A. I might be passing sometime there but I do not remember whether I pass a good many times or not but I pass along the building every day I know.

Q. And you saw the men working every day in that cellar?

A. Yes, sir.

Q. And you necessarily saw that wall every time you passed, didn't you?

A. Well, I was bound to see it.

Q. Bound to see it, of course you were, and you never saw this bulge or this slant until just ten or fifteen minutes before you sent in after Ruppe, did you?

A. I never—I might see it—see the wall before but I did not think there was any danger because you can see a good many bulges on walls—I did not know whether the wall would fall—I could not say whether the wall was plumb or not until might be ten or fifteen minutes before the wall fell—in front.

Q. Now, you testified in this case when it was tried before, did you not?

A. I think so.

Q. And before giving that testimony you talked with counsel about the case and with Mr. La Driere about it, have you not?

A. I do not remember if I did.

799 Q. Didn't counsel or Mr. La Driere or somebody for the defendant talk with you before you went on the stand at that time as to what you had seen?

A. I do not think they ever asked me—I do not think about it or what I did see.

Q. Before you went on the stand?

A. Might be Mr. Childers asked me if I did see—if I was there or I did see something before I went on the stand at that time.

Q. Well, now that our memory is refreshed he did didn't he, and talked the matter over with you before he went on the stand, didn't he,—Mr. Childers?

A. If he did he did right here you know in court—if he did he did it right here in the court.

Q. How did the defendants know that you were there and had seen this wall fall; did you not tell them so, some of them or some representative and talk it over with them?

A. They did see me right there yes, because I been standing there quite a while after the wall fell.

Q. Who saw you there?

A. Mr. La Driere and of course a good many more—everybody that was there—I was standing right there after the wall fell.

Q. How many times between the time that the wall fell and the time that you testified on this second trial did you talk this situation over with Mr. La Driere?

A. I cannot tell you.

Q. You do know that you did talk it over with him, don't

800 you?

A. I do not remember if we did or not.

Q. Well, why didn't you tell some of them at or before that first trial, or that second trial, that you saw this crack in the wall before the building commenced to fall?

Mr. FIELD: I object to the question because the witness has not said he attended the first trial or testified at the first trial and my recollection is there was no such evidence at the first trial, and that he didn't testify.

Mr. WOOD: I inadvertently said first trial and then said second trial.

The COURT: You better say the last trial before this.

Mr. WOOD: I will amend the question to read the last trial before this.

Q. Why didn't you tell some of them at or before the last trial before this that you saw this crack in the wall before the building commenced to fall?

A. Oh, I didn't have no occasion to say anything about it.

Q. Well, you had occasion to say something about it when you were on the stand at the last trial, didn't you?

A. Because they asked me questions and I answered it.

Q. Did you tell them a thing, or tell anybody at that trial when you were on the witness stand a thing about having

801 seen that crack at any time before the occasion that the wall fell?

A. Might *did* and might not—I cannot remember—I cannot recall whether I did or not.

Q. You read your testimony over that you gave on that last trial and you read it over here in this court house yesterday, didn't you?

A. Well, I just looked at it about five minutes—I did not pay much attention.

Q. What were you looking at it for?

A. Well, because I thought I could recollect everything yet.

Q. You wanted to refresh your recollection did you not as to what you testified to before so as to be in position to testify this time; that was your purpose in reading it over was it not; was that your purpose?

A. Well, I think so.

Q. Certainly?

A. I just say what I recollect.

Q. Certainly; I am not denying that—now then you did read it over for the purpose of refreshing your recollection as to what you testified to before, did not you?

A. I do not know exactly if I did or not; but I know I just looked at it about a few minutes any way.

Q. Did you see anything in it wherein you testified before to seeing that crack at any time prior to the occasion when the wall fell?

A. No.

Q. And there is not anything in it and you didn't so testify at the former trial, did you?

802 A. I do not remember that I did.

Q. Now then you say you didn't see the foundation; didn't you see a portion—a portion of that foundation fall at the time the wall fell and fell into that excavation at the northeast corner of the wall?

A. Yes, I did but I say that I didn't see any foundation in front of that crack—If I see some foundation it was just where it was excavated.

Q. Where they had dug down under the wall, that is where you saw the foundation is it: is that what you mean by excavation?

A. Where excavated—not exactly—I did not say they excavated under the wall but I see the place where they excavated there for the cellar—see one or two stone laying there with the adobe together when the wall fell inside of his— I see a couple of stone there too.

Q. Where was that point where you saw the stone of the foundation fall?

A. I saw it fall *when* the wall together.

Q. What point of the wall?

A. Near the north corner.

Q. And you saw that stone fall out of the foundation did you when the wall fell?

A. I did not see it fall but after the wall fell I see that stone there—that sure came out from the foundation.

Q. And that was right under the point, or right at the bottom

of the foundation at the point of that excavation where you saw the stone, was it not?

A. Very near there.

803 Q. Now, didn't you see that that was dug out under that wall at that corner where that stone fell?

A. I see it was one part of the wall built already——

Q. You are not answering my question?

A. Well, I see one place a little further up where they were digging.

Q. Didn't you see that hole dug out under the Ruppe wall up at that corner?

A. I see a hole there—I did not know if it was entirely dug out or not but I know they were working on it—they were digging on it.

Q. When were they digging on it?

A. That same day.

Q. That same place, about the time the wall fell?

A. Before that they were working on it, yes.

Q. And while you were standing there as you testified you saw them digging on that hole?

A. Yes, they were.

Q. Now—now you say they had not entirely dug—you mean they had not completed this hole that they were digging *you*, don't you?

A. I do not think they had or not—I know they were working on it, and I do not know if they had completed it or not.

Q. Don't you know that they had dug under that wall some, whether they had completed it or not and dug under that corner?

A. They were working on it.

Q. Under it?

A. They were working on digging that part.

804 Q. Weren't they digging under Ruppe's wall—you know what under means, don't you?

A. I cannot tell if they were finished or if they — digging underneath or not—I could not tell that—I know they were digging dirt near at that place for the purpose of re-building a wall.

Q. I am afraid that you do not quite understand me: as you saw that hole that time, did it not extend to some degree where they had dug under Ruppe's wall?

A. It was there——

Q. Yes or no please.

A. I think it was far enough from the wall of Ruppe.

Q. Yes or no please to my question.

A. If they were digging underneath, you mean?

Q. Didn't the hole they had dug at the time you last saw them there extend to some degree under Ruppe's: yes or no?

A. I think it did, yes.

Q. Well——

Mr. Wood: That is all.

Mr Field: That is all.

Thereupon the witness was excused."

The hour of five o'clock having arrived, an adjournment was here taken until tomorrow morning at 9 o'clock a. m.

And now on this March 8th, 1910, the court met pursuant to adjournment, and the trial proceeds:

Mr. MANN: The defendants rest.

805 *Rebuttal.*

BERNARD RUPPE, one of the plaintiffs, a witness introduced in behalf of the plaintiffs, having been heretofore duly sworn testified further as follows:

Direct examination by Mr. WOOD:

Q. Mr. Ruppe, did you ever notice the outside of the wall of your building before it fell as to whether or not there were cracks in it?

A. Yes, sir.

Q. State whether or not there was any break—there was any crack in your building back at or about the place where the wall finally broke before the day on which it fell?

A. No, sir.

Q. State whether or not you noticed any cracks at all in that wall prior to the day on which it fell?

Mr. FIELD: I object to that as not rebuttal: This witness has already given his version of it——

The COURT: Overruled.

Mr. FIELD: Exception.

A. No, sir.

Q. Now, Mr. Ruppe, state whether or not you noticed the space between the wall of your building, and the walls of the building on lot number one, before the walls of the building on lot number one were taken down?

Mr. FIELD: I object to that as not rebuttal, and because it
806 is part of the plaintiffs' case in chief.

The COURT: Overruled.

Mr. FIELD: Exception.

A. Yes, sir.

Q. State whether or not those walls touched each other before the wall on lot number one was taken down.

Mr. FIELD: Objected to as not rebuttal, and as leading and suggestive.

The COURT: It is somewhat leading. I do not think he testified how far apart they were.

Q. State how much, if any, space separated the two walls—the wall of your building and the wall of the building on the Wienman (Barnett) lot, before the building on the Barnett lot was removed?

Mr. FIELD: Objected to as not rebuttal: The plaintiffs gave testimony on this subject as part of their case in chief.

The COURT: Overruled.

Mr. FIELD: We except.

A. Yes, sir; there was a space which was about three to four inches on top.

Q. You say "on top:" state what that space was—the smallest that space was at any place between those walls as you noticed it?

807 Mr. FIELD: Same objection.

The COURT: Overruled.

Mr. FIELD: Exception.

A. About two inches.

Q. Now, Mr. Ruppe, did you have conversations with Weinman—the defendant Weinman, concerning this building, and relating to the question of the danger of its falling, prior to the fall of the building?

Mr. FIELD: We object to giving conversations inquired about—conversations between this witness and Weinman, except such conversations as Weinman testified to, and we object to this question because it is not confined to those conversations.

Mr. WOOD: This question merely asks if he had conversations.

The COURT: Objection overruled.

Mr. FIELD: Exception.

A. Yes, sir.

Q. And when did you have those conversations?

Mr. FIELD: The same objection.

The COURT: Overruled.

808 Mr. FIELD: Exception.

A. At various times during the month of June.

Q. You heard the witness Weinman testify to conversations had with you about that time, did you not?

A. Yes, sir.

Q. Now state what the conversations were that you had with him at the times testified to by him?

Mr. FIELD: To which we object as irrelevant and incompetent, the question here being whether or not he had these particular conversations.

The COURT: Overruled.

Mr. FIELD: Exception.

Mr. MANN: The defendant Weinman further objects for the reason that it is not rebuttal, this witness having testified to these same conversations in chief.

Mr. FIELD: Defendant Barnett also joins in that objection.

Mr. WOOD: I have not in mind that he testified to any conversations with Weinman, but I have in mind that he had talks with La Driere.

The COURT: I do not remember—still, I do not expect to carry it all in mind and I may be mistaken. That is why I overrule the

objection: I do not think there was any testimony by him as to the kind of talks he had with Weinman—the kind of
809 talks that Weinman testified of.

Mr. MANN: Exception.

Mr. FIELD: Exception.

A. Mr. Weinman informed me that the wall was *the* remain where it was— that it was far enough on my ground—that the party-wall could be built without disturbing that wall. I told him that it looked to me as a dangerous proceeding as he stated that they would chop off some of the bottom of the wall—and suggested the putting in of a false wall and that then we would have a nice fine wall with a new brick wall—he said that the necessary precautions—that La Driere assured him that no excavation should be made under the wall until the rock, mortar and props were in place to put in the piers—would be done and I naturally felt satisfied on his assurance.

Mr. MANN: I move to strike out all of the answer of the witness as not responsive and as not rebuttal, for the reason that it does not give the conversation, but purports to give his conclusions.

The COURT: I think the last part of it was a conclusion.

Mr. WOOD: Yes, I think so.

The COURT: The last part of the answer that he naturally felt satisfied on his assurance——

Mr. FIELD: I move to strike it out on the ground that it
810 does not appear to be the same conversation about which the witness Weinman testified or was asked, and that it is an attempt to get before the jury in the guise of rebuttal this witness' version of this conversation after he has testified in chief upon the same subject.

The COURT: Overruled.

Mr. FIELD: Exception.

The COURT: The last part of the answer that he felt satisfied on his assurance, is stricken out and taken from the consideration of the jury.

Q. Mr. Ruppe did Mr. Weinman at various times prior to the falling of the wall, and while the excavations was going on, ask you if there was any danger of the wall falling?

A. Yes, sir.

Q. And when and what was that conversation?

A. Mr. Weinman was in the store daily—I kept my eye on the paper——

Mr. FIELD: I object to that as not responsive to the question which was when he had the conversation——

The COURT: Let him finish his answer.

Mr. FIELD: We object—and I particularly object to the interpretation of the answer which is manifestly not responsive, and except to the refusal of the court——

811 The COURT: Go on and finish.

A. (Con.) —the store had been newly papered——

Mr. Wood: I ask the witness to limit himself to answering the question——

Mr. Field: I ask that the gentleman be not allowed to interfere with the witness, when the court would not let us do in protecting our clients' rights——

The Court: Go on——

Mr. Field: Exception.

A. (Con.) I watched the paper and told Mr. Weinman that I did not notice any movement in the wall, but if there was the paper would undoubtedly show it—this happened more than once during the month of June.

Mr. Field: We move to strike out the answer of the witness as not responsive to the question.

Mr. Wood: I will consent.

The Court: The answer may be stricken out and the jury will not consider it; It is not responsive to the question.

Mr. Wood: Now, I ask permission of the court to show by this witness the value of the damaged goods, after the damage: and I ask permission to show it now, although it was a proper mat-
812 ter to go into before: The only excuse I can give for asking it now is, until we got into the discussion at the end of the case as to the measure of damages and as to the proof of damages upon that subject, we were under the impression it was clearly covered, but from the discussion we then got into, it seemed to me then that the matter was left perhaps to some speculation and in doubt, and for that reason I ask permission now to show the reasonable value of those goods after the damage.

Mr. Field: To which we object for the reason that it is part of their main case and according to counsel's own statement he knew of it at the close of his main case, and should have been required to put it in then which would have given us an opportunity to rebut it and he ought not be allowed to put it in now after their case is closed and the witnesses dismissed. The record will show that every step in the introduction of this evidence, which he now seeks to supplement, proceeded over the objection of the defendants, the court overruling our objections presenting this very question—and which were presented and argued in detail, at the close of the case—attention being continually called to them.

Mr. Mann: They do not claim surprise and they ought to have put it in when the main case was before the jury and not wait until after the case was closed on both sides, and to reopen the case and permit them to put in further claim of damages is an abuse of discretion: that is why I object to it on behalf of defendant
813 Weinman.

After extended argument; during which the jury retire.

The Court: I do not feel at liberty to reopen the case for that purpose—the time has passed during which it might have been presented and further my belief is that there is evidence which probably with the jury will be just as persuasive as any that might be put in.

Mr. Wood: It is only my object to remove the question from

the case on review—which is more serious, it having now been tried four times.

The COURT: I shall try to cover the point in the instructions.

Thereupon the jury return to the jury box.

Mr. WOOD: That is all with this witness.

Cross-examination by Mr. FIELD:

Q. Mr. Ruppe, Mr. Weinman did propose to put a false wall in there while this new wall — being built, did he?

Mr. WOOD: I object to that upon the ground that the witness on direct examination gave no testimony on that subject, such as he did give being stricken out upon motion of the defendants, and it is therefore not proper cross-examination.

The COURT: I think that answer was struck out.

Mr. FIELD: I do not think that was the answer which was
814 struck out.

Mr. WOOD: Possibly I did not understand the question, and I wish to hear it read——

Q. (Repeated.)

Mr. WOOD: I will withdraw the objection.

A. No, sir.

Q. Didn't you say this morning in answer to a question by your counsel that he did suggest to you the putting in of a false wall, so you would have a nice smooth brick wall when they got through?

A. I suggested that to him.

Q. You suggested to him the putting in of a false wall?

A. Yes, sir.

Mr. FIELD: That is all.

Mr. WOOD: That is all.

PITT ROSS, introduced as a witness in behalf of plaintiffs in rebuttal, having been heretofore duly sworn, testified further as follows:

Direct examination by Mr. WOOD:

Q. Do you recollect the appearance of the outside of that Ruppe wall before it fell as to whether or not there were cracks in it?

A. No, sir—I didn't see anything so——

Mr. FIELD: I move to strike out the latter part of the answer as not responsive.

815 Mr. WOOD: I do not think it is——

The COURT: It may be stricken out.

Q. My question was did you observe it—did you notice the appearance of the outside of the wall?

A. I did.

Q. Now state whether or not there was a large crack in the wall at that point where it finally broke, about that point, as you saw it before it fell?

Mr. FIELD: Objected to as not rebuttal, the witness having been exhausted on the subject in chief.

Mr. MANN: And for the further reason that we do not know what this witness would call a large crack.

Mr. WOOD: I will strike out the word "large."

The COURT: Objection overruled.

Mr. FIELD: Exception.

A. No, sir; I did not see any crack.

Q. Mr. Ross, did you notice while both the east wall of the Ruppe building and the west wall of the building on the Barnett lot were still standing, how near those two walls approached each other in front?

Mr. FIELD: Objected to as leading and suggestive and not rebuttal, the witness having testified about this in chief.

816 The COURT: Overruled.

Mr. FIELD: Exception.

A. No, sir; I did not notice.

Q. Was the wall upon the Barnett lot removed at the time you made your first measurement?

Mr. FIELD: Objected to as not rebuttal and suggestive.

The COURT: Objection overruled.

Mr. FIELD: Exception.

A. The greater part of the wall had been removed when I made the first survey.

Q. How much of that wall on the Barnett lot, if any, remained in place when you made that survey, toward the front or north end of the building?

Mr. FIELD: Objected to because the witness answered this particular question in chief and it is not rebuttal.

The COURT: I do not feel sure that he did answer it: I will overrule the objection.

Mr. FIELD: Exception.

A. I think none of it was in place when I made the survey at the north end.

Q. Now how far back had it been removed at that time?

817 Mr. FIELD: The same objection.

The COURT: Objection overruled.

Mr. FIELD: We except.

A. Well, fully three-fourths of it had been removed—only the portion at the south end was standing.

Q. What I am trying to get at Mr. Ross, was there any portion of that wall to the north of the point where the wall finally broke in place at the time you made your measurements?

Mr. FIELD: Objected to as leading, suggestive and not rebuttal, the witness being exhausted on the subject in his examination in chief.

The COURT: Overruled.
Mr. FIELD: Exception.

A. I am not sure that there was more than a few of the lower courses of the adobes on the foundation at that time, except along the south half where the men were still engaged in removing them—from that—sloping up to the brick wall there was quite a portion of the wall in place, but at least the upper half of that part had been taken down.

Mr. FIELD: I ask to strike out the answer of the witness as not responsive to the question, as the counsel told the witness,
818 as I remember it, that he wanted to know about the north end of the wall and the witness is telling about the south half.
The COURT: Objection overruled.
Mr. FIELD: Exception.

Q. Now, Mr. Ross, give your best recollection as to the condition of the wall on the Barnett lot north of the point where the Ruppe wall finally cracked, if any of it remained at the time you made your measurements?

Mr. FIELD: Objected to as not rebuttal, the witness having been exhausted on this point in chief.
The COURT: Objection overruled.
Mr. FIELD: Exception.

A. Well, my recollection is that practically all of the wall had been removed—only a few of the lower courses of the adobes being in place.

Q. Now, did you notice how close those lower courses of adobes that you mention approached to the Ruppe Wall?

Mr. FIELD: Objected to as leading and suggestive, and the witness having been exhausted on this subject in his examination in chief, it is not rebuttal.
The COURT: Overruled.
Mr. FIELD: Exception.

A. Yes, I noticed that the top of them was slightly dusty
819 and little broken pieces of adobes that lay over the wall—so far as the dust was concerned—remaining together, but I did not remove the dust and make an examination; so that I do not know—I simply walked along some of them and then saw I could not do anything in measuring that way, and went back.

Q. What was this dust that you speak of?

Mr. FIELD: The same objection.
The COURT: Overruled.
Mr. FIELD: Exception.

A. Well, as you remove the adobes from the wall the plaster crumbles up—sometimes the plastering will drop with a little particle of the adobe itself—it was an old wall of rather rough work and naturally the men did not exercise any particular care in pulling

them out—just pulled them out and the dust would lie there in the crack.

Mr. FIELD: I move to strike all that out as not responsive and as a mere expression of opinion, and conclusion of the witness and not a description of the facts.

The COURT: Overruled.

Mr. FIELD: Exception.

Mr. WOOD: That is all.

Mr. WOOD: We desire an exception to your Honor's ruling
820 refusing to allow us to re-open for the purpose specified in our motion.

The COURT: Yes.

Mr. WOOD: That is the case for the plaintiffs.

Mr. MANN: No sur-rebuttal on the part of the defendant, Weinman.

Mr. FIELD: Nor on the part of the defendant Barnett. I now move on behalf of the defendant Barnett—I renew the motions to strike out the evidence which was made at the close of the case of the plaintiffs, for the reasons stated there, and which reasons have been emphasized by subsequent proceedings in the case.

Mr. MANN: And in which motions the defendant Weinman joins.

The COURT: I will overrule the motions.

Mr. FIELD: Exception.

Mr. MANN: The defendant Weinman excepts.

Mr. FIELD: I apprehend that these motions will appear in the record as they will appear at the close of the plaintiffs' case, that they will be renewed here, not as a whole but each motion sepa-
821 rately with the rulings and exceptions on each.

Mr. MANN: The defendant Weinman also desires the motions to be here put in the record as made at the close of the plaintiffs' case with the rulings and exceptions of defendant Weinman.

The COURT: Yes.

Whereupon the motions referred to by counsel are here copied into this record, as follows:

"Mr. FIELD: On behalf of the defendant Barnett I desire to move to strike out certain portions of the testimony: In the first place I desire to move to strike out all of the books of account offered in evidence in behalf of the plaintiffs in this case for the reason that it affirmatively appears that these books of account are not in themselves—do not constitute in themselves a complete system of accounts from which a bookkeeper could ascertain the amount of capital embarked in this business or the amount of business actually conducted, or the profits thereof; that it is impossible to ascertain from these books of account the merchandise purchased and the amount of expense incurred in the conduct of the business, and also that no foundation has been laid for the introduction of them, as books of account under the requirements of the statute of this Territory in such cases; that by the laws of the Territory of New Mexico, section 2650 of the compiled laws of 1897, and that chapter generally, a partnership is required to keep their books in due form, and in-

ventory their stock and actually keep account of all the busi-
822 ness that they transact; that these books do not conform to that requirement; further, that it affirmatively appears that at and before the institution of this suit, and afterwards, plaintiffs had in their possession other evidence of a documentary character, which taken into connection with the books of account introduced here, would have enabled a bookkeeper—or person familiar with accounts—to ascertain the extent of the business transacted by the plaintiffs, the amount of the profits and the expenses—all the other necessary data, and it affirmatively appears that that documentary evidence was intentionally destroyed by one of the plaintiffs, Bernard Ruppe, or under his direction."

In which motion the defendant Weinman joined, and the court having overruled the motion each of the defendants then and there duly excepted.

"Mr. FIELD: I further move to strike out all of the evidence of the witness Bernard Ruppe, with reference to the value of goods that were damaged, and the extent of damage to those goods, for the reason that there is no legal evidence which would authorize the court to submit to the jury the question of such damages, and for the further reason that no such damages are claimed in the complaint, and no such item is contained in the bill of particulars made under the order of the court."

In which motion the defendant Weinman joined, and the court having overruled the motion each of the defendants then and there duly excepted.

823 "Mr FIELD: I further move the court to strike out all of the testimony of the witness Ruppe which was given after refreshing his recollection by the use of the bill of particulars while he was on the witness stand, for the reason that no proper foundation was laid for permission to the witness to use the bill of particulars for the purpose of refreshing his recollection; and it affirmatively appears that that bill of particulars was a copy of another list which was contained in a book which was lost lost; that the loss of that book is not sufficiently established; and for the further reason that if the book were here, it was not such a memorandum as under settled rules of evidence the witness Ruppe would be permitted to refer to for the purpose of refreshing his recollection; it affirmatively appearing that it was not made at or near to the time of the transactions with which it purports to deal; was not made on Ruppe's personal knowledge, but was made up over a period of months of time in which he listed in that book such articles of merchandise as he missed out of his stock, for months after the fall of the wall, and upon consultation with Baltes and Mallette, his clerks; and that he put on that list such articles of merchandise as were not found in his stock from time to time, whenever he did not remember that they had been sold—whenever Baltes did not remember that they had been sold, or whenever Mallette did not remember that they had been sold, or whenever all or any one of those remembered that they had had those things in stock before the removal from the building

which fell down; and it further affirmatively appears that
824 this was not a writing which was known by the witness to be correct at the time it was made, or one which he would be authorized under the law to inspect for the purpose of refreshing his memory; neither was the writing or a copy of it, legal evidence of any fact therein contained."

In which motion the defendant Weinman joined, and the court having overruled the motion, each of the defendants then and there duly excepted.

"Mr. FIELD: I move to strike out all of the testimony of the witness Ruppe with reference to the character of the business section of the town of Albuquerque, and the relative—I do not remember just what the term was—availability, I will say that—the witness did not say that—availability of its purpose—of the various places to which he moved after the fall of the wall, and his opinion as to how much better a place of business the one which he rented from Weinman was to the other places to which he removed—the relative availability of the business location—because no proper foundation was laid for such evidence, and in the second place there is no evidence that the defendants, or either of them notified Mr. Ruppe to engage in business at any other place, except the Weinman place, and testimony as to these points, to which by this particular objection attention is called, tends to mislead the jury and introduce a false issue in the case."

In which motion the defendant Weinman joined, and the court having overruled the motion each of the defendants then and there duly excepted.

825 "Mr. FIELD: I move to strike out all of the testimony of the witness Ruppe with reference to the loss of profits, as well as all the testimony as to the amount of cash sales, and his estimate of expenses, and of all testimony of that character, because in the first place, no proper foundation was laid for it, and in the second place, it was largely opinion evidence, and in the third place, the evidence is wholly insufficient, taken as a whole, together with all the other evidence in the case, to authorize the court to submit to the jury the questions of loss of profits."

In which motion the defendant Weinman joined, and the court having overruled the motion, each of the defendants then and there duly excepted.

"Mr. FIELD: Now, in behalf of the defendant Barnett, I move the court to direct the jury to find a verdict for the defendants on the ground that there was a total failure of proof of the allegations of the complaint and the testimony, showing that the plaintiffs were partners, and the complaint not claiming to recover as such partners, but as individuals."

In which motion the defendant Weinman joined, and the court having overruled the motion, each of the defendants duly excepted.

"Mr. MANN: The defendant Weinman moves the court for a verdict in his favor in this case, for the reason that the testimony developed that the plaintiffs in this case, Richard Di Palma
826 and Bernard Ruppe were partners, under the firm name of the Cosmopolitan Pharmacy, and that the property alleged

to have been injured and destroyed was the property of such firm, the Cosmopolitan Pharmacy, and not the individual property of the plaintiffs in this case, and that the complaint in this case does not state a cause of action against the defendant."

And the court having overruled said motion, the defendant Weinman, by his counsel, then and there duly excepted.

Thereupon, at the hour of 10:35 a. m., the court instructed the jury, in writing, prior to the arguments of counsel, which instructions are in words and figures as follows, to-wit:

I.

The plaintiffs in this cause allege and have submitted to you evidence for the purpose of showing that the defendant, Jacob Weinman, between the ninth day of November, 1901, and the 30th day of June, 1902, was the owner of lot 2, block 16, of the original townsite, which adjoined lot 1, of the same block, owned by the defendant, Barnett, at the corner of Railroad avenue, now Central avenue, and Second street, in the city of Albuquerque.

That on the 9th day of November, 1901, the defendant, Weinman, executed and delivered to the plaintiffs, Richard Di Palma and Bernard Ruppe, a lease of the said lot 2, for the period of two years from the 15th day of December, 1901, to the 15th day of December, 1903; that the plaintiffs took possession of said lot 2 on or about the
15th day of December, 1901, and occupied the same with
827 their drug store up to the time of the fall of a portion of the east wall on the 30th day of June, 1902.

That on the 6th day of May, 1902, and while the said plaintiffs were so occupying said lot 2, with their drug store, the defendants, Weinman and Barnett, entered into a contract for the erection of a party wall on the line between said lots 1 and 2, one half of which party wall, including a footing course forty inches wide was to be on the said lot 2, and one half on lot 1, and under the terms of said contract agreed that the defendant Barnett might take down any part of the wall on lot 2 necessary to locate said party wall centrally over said party line between lots 1 and 2.

That in pursuance of the said contract the defendants caused to be excavated a portion of said lot 2, under the east wall of the building thereon occupied by the plaintiffs for their drug business, and thereby on June 30th, 1902, caused a portion of the east wall, a part of the front and a part of the roof of said building to fall, rendered said building unfit for use and destroyed and damaged another part of the personal property of the plaintiffs in said building, made necessary the removal of the remainder to another place and injured their said drug business.

The defendants deny these allegations and have submitted evidence in support of their denial as to some of them. They say, besides, in substance, that whatever they, or either of them, did, or caused to be done on the premises in possession of the plain-
828 tiffs, if anything was so done, which they deny, was done by the previous consent of the plaintiff Ruppe.

The plaintiffs in their complaint pray damages for their eviction from the premises in question and the loss of the leasehold, but they have offered no evidence on that point, and you will allow nothing for damages on that account.

(To the giving of which paragraph of the charge the defendants severally excepted and still except because the same does not correctly state the issues in the case and is prejudicial to the defendants.)

2.

You are instructed that while there is incident to land in its natural condition a right to support from adjoining lands, nevertheless if the land sinks and falls away in consequence of the removal of such support and such sinking and falling away is caused by artificial pressure of the building or wall upon the same, the owner is not entitled to damages. And although you may believe from the evidence that the defendants caused an excavation to be made upon the lot adjoining the lot number 2, occupied by the plaintiffs as lessees, if you further believe from the evidence that the earth on said lot number 2, occupied by the plaintiffs as aforesaid, sank and fell away on account of the pressure of the wall upon the same, and not because of any acts done by defendants on said lot number 2, then the plaintiffs are not entitled to recover and you should find a verdict in favor of the defendants.

329 3.

You are further instructed that the defendant Barnett was under no obligation to maintain a wall on the west line of lot number 1, but had a right to remove the same, and if you believe from the evidence that after the removal of the said wall of the building occupied by the plaintiffs fell, because of the removal of said wall by said defendant Barnett on the adjoining lot, and not because of anything done to said wall which fell, or on the lot 2, by the defendants or those acting by their authority, or fell by reason of any inherent defect in the wall of the building occupied by the said plaintiffs, then the plaintiffs are not entitled to recover and you should find a verdict in favor of the defendants.

4.

You are further instructed that the defendant Barnett had a right to remove the wall on his own lot, and if you believe from the evidence that the wall of the building occupied by the plaintiffs fell by reason of the removal of the wall next to it on lot one, belonging to the defendant Barnett, and not because of anything done or caused to be done by the defendant Weinman on lot 2, then you should find a verdict in favor of the defendants.

5.

You are further instructed that if you believe from a preponderance of the evidence that the said party wall agreement was entered

into by and between the said defendants Barnett and Weinman, still, if you further believe from the evidence that nothing was ever
830 done under said agreement by said Barnett except upon his own lot number 1, then the defendants would not be liable, and the plaintiffs are not entitled to recover in this action, and you should find a verdict in favor of the defendants.

6.

You are further instructed that if you believe from the evidence that one of the plaintiffs, B. Ruppe, stood by, knowing the kind of wall that was to be erected, where it was to be placed, and the manner in which the same was to be erected and acquiesced in the erection of the same, and by his conduct, led the defendants to believe that he acquiesced and consented to the erection of the same, as it was to be erected, then the plaintiffs are estopped from recovering in this action for damages occasioned by doing anything to which they so consented. But if the plaintiff, Ruppe, was misled by representations made by or in behalf of the defendants, or either of them, as to the safety of what it was proposed to do, and was not so well qualified to judge as to their truth, as were those who made them, and for that reason acquiesced, then the plaintiffs are not estopped by such acquiescence.

(To the giving of which paragraph of the charge the defendants severally excepted and still except because the same is not based upon any evidence in the case and is prejudicial to the defendants.)

7.

You are further instructed that in a case like this, it is incumbent upon the plaintiffs to satisfy the jury by a preponderance of
831 the evidence, that they actually suffered damage and of the extent of such damage, if any. Damages which are purely speculative, which depend upon uncertain and changing conditions, or which are not susceptible to proof to such an extent that the jury should be reasonably satisfied that the same was actually incurred, as the proximate result of some wrongful act on the part of the defendants, are not recoverable in this case, and should not be taken into consideration by you in estimating the amount of the plaintiffs' damages, if you allow damages.

8.

You are further instructed that unless you believe from a preponderance of the evidence that the wall of the building occupied by the plaintiffs fell by reason of excavation made upon lot number 2 in block 16, that such excavation so made upon lot number 2 and block 16 was the proximate cause of the fall of the said wall, you should find the issues for the defendants; otherwise you should find the issues for the plaintiffs.

(To the giving of which paragraph of the charge the defendant Barnett excepted and still excepts, and the defendant Weinman excepted and still excepts because the same does not specify that the

jury must find that if there was an excavation on lot 2 he could not be held for damages unless said excavation was contemplated by the party wall agreement which he signed.)

9.

You are further instructed that there is no presumption that the wall of the building in question fell because of anything done
832 by the defendants, or either of them, and before the plaintiffs can recover in this case, they must satisfy you by a preponderance of the evidence that the injuries alleged in the complaint were in fact occasioned by the wrongful act of the defendant, and not merely that they might have been so occasioned.

10.

You are further instructed that it was the duty of the plaintiffs whenever they ascertained that they were about to suffer an injury or were likely to suffer an injury by any act of the defendants, to use all reasonable means within their reach to avert such injury, and to protect their property from loss or damage, and if you believe from the evidence that the plaintiffs could, after they discovered that their building was in danger, by the use of reasonable care, have prevented or lessened the damages which they suffered by the fall of the said building, if any, they were bound in law to do so, provided the means of so doing were reasonably within their reach, and they cannot recover in this case any damages which might have been so prevented but could only recover what would have been the reasonable costs of preventing the same.

11.

You are further instructed that when the property of a person is threatened with injury or damage by the wrongful act or neglect of another, the law imposes upon that person the duty and obligation to use reasonable care to prevent such injury, and to lessen the damage which may be occasioned thereby, and in case of failure
833 of such person to take such steps as may be reasonably within his reach to lessen or prevent the damage, the law will not permit him to recover for damages which might have been so prevented.

12.

You are further instructed that the party wall agreement offered in evidence by the plaintiffs in this case was a contract which the defendants might lawfully enter into between themselves, and of which the plaintiffs would have no right to complain unless they were injured by something in pursuance thereof, and that there is no presumption that anything done in pursuance of said party wall agreement did injure the plaintiffs, and the plaintiffs are bound in law to establish their case, and the cause of the injuries inflicted on them by the same degree of proof that would have been necessary if no such party wall agreement had ever been entered into between the defendant, that is, by a preponderance of the evidence.

13.

You are further instructed that the defendant Weinman had no lawful right, without the consent of the plaintiffs, to go upon lot 2 if it was occupied by the plaintiffs as his tenant under the lease in evidence, and to erect a wall on the line between said lot 1 and 2, a part on each lot, or to tear down the wall or any portion thereof, of the building so occupied by the plaintiffs, and that he could not give the defendant Barnett any lawful right to do that which he, the defendant Weinman, had not the right to do.

834 (To the giving of which paragraph of the charge defendants severally excepted and still except because the same is a misstatement of the law of the case and prejudicial to the defendants, for the reason that the rights of the plaintiffs under the lease is not in controversy, the defendants having been sued as joint tort feasors and not ex-contractu.)

14.

You are instructed that any actual expulsion of the tenant by the landlord or by any person acting by his authority, or anything so done which so seriously disturbs the tenant's possession as to compel an abandonment of the premises by them, or which deprives him of their beneficial enjoyment, amounts to an eviction and the rent is suspended from the time of such expulsion or disturbance.

(To the giving of which paragraph of the charge the defendants severally excepted and still except because the same is a misstatement of the law of the case and is prejudicial to the defendants.)

15.

You are further instructed that if you find from a preponderance of evidence that the defendant Barnett in pursuance of the contract between himself and the defendant Weinman and without the consent of the plaintiffs, caused excavations to be made on said lot 2, or any portion thereof, either by his agents or servants, or by any independent contractor, then both these defendants, Weinman and Barnett, were equally guilty of trespass, and it is immaterial that

835 the parties doing the work were also trespassers because the plaintiffs had the right to sue any one or more of those guilty of trespass.

(To the giving of which paragraph of the charge the defendants severally excepted and still except for the reason that the same is a misstatement of the law of the case and inconsistent with other instructions given by the court.)

16.

You are further instructed that if you find from a preponderance of the evidence that the defendant, Barnett in pursuance of said contract between himself and Weinman, as aforesaid, and without the consent of the plaintiffs, caused excavations to be made on lot 2, and caused the soil to be excavated and removed from beneath the wall of the building so occupied by said plaintiffs, and thereby caused a portion of said wall and building to fall, as alleged in the plaintiffs'

complaint, and that the plaintiffs were injured in their property thereby, your verdict should be for the plaintiffs for such sum not exceeding ten thousand dollars, exclusive of any damage which you might allow in the nature of interest, as claimed in the complaint, as the evidence may warrant, under the further instructions of the court as to the measure of damages.

17.

If you find from a preponderance of the evidence that said defendants committed the acts complained of by said plaintiffs, and you further find that the plaintiffs were damaged thereby, then you will find from the evidence the amount which was the natural and
836 proximate consequence of the said wrongful act of the defendant, and your verdict should be in such amount as will compensate the plaintiffs for the damage suffered.

(To the giving of which paragraph of the charge the defendants severally excepted and still except for the reason that the same is a misstatement of the law in the case and does not lay down a proper rule for damages in the case.)

18.

You are further instructed that in arriving at said amount you may take into consideration the testimony regarding the loss of profits occasioned by removal to another location, the testimony regarding the value of the stock of merchandise and fixtures destroyed, if any were destroyed, and the testimony regarding the injury and damage, if any, to the remaining stock and fixtures, the testimony regarding reasonable expenses in removing to another location, and the repair of the fixtures and furniture partially destroyed, and the testimony regarding such other items to which it relates, as are the proximate consequences of the acts of the defendants, if you believe from a preponderance of the evidence that the acts of the defendants complained of were the proximate cause of any loss or damage to the plaintiffs.

(To the giving of which paragraph of the charge the defendants severally excepted and still except because there is no competent evidence in the case upon which a verdict of loss of profits could be based and because loss of profits cannot be recovered in this action.)

837 19.

You are instructed that an established business is capable of injury or destruction, as a house or other material object is, but in the nature of the case it is much more difficult to determine the value of a business destroyed or the amount of damages to it if injured than it is to determine the value of a house or the injury to it. To illustrate, a man may have an established business of growing vegetables for the market and may have customers in his neighborhood who are in the habit of buying of him; he may have a lease of a parcel of land on which he grows the vegetables on which crops will not grow without irrigation. The land may be irrigated from a stream which

is the only source from which it could be irrigated. That stream might be diverted at its source by the work of man or by some convulsion of nature, so that it would no longer be possible to irrigate the land. In that way his business might be wholly destroyed. If he could get other land, not too far from his customers on which he could grow vegetables his business might not be destroyed or even injured. It might cost him something to make the necessary changes, but that would not be injury to his business as such. Injury to the business would consist in loss of trade or greater expense in supplying his customers, or both. To show what the injury to the business was, evidence in relation to the profits before and after the change would be admissible, but would not be alone and in itself conclusive.

838 If under instructions given you and on the evidence you have heard, you determine that the plaintiffs are entitled to recover damages from the defendants, you should then determine from the evidence the value of the personal property of the plaintiffs, if any, which was wholly destroyed, and in doing that take its market value in Albuquerque at the time, not at retail in the business of the plaintiffs, but the cost to them as apothecaries, to replace the goods destroyed in their stock in Albuquerque, and in determining the damage to plaintiffs, if you find there was any, from injury to goods which were not wholly destroyed or lost, you should take the difference, if you can determine it from the evidence, between the market value before the injury of such goods in Albuquerque, as already explained to you and their value determined in the same way after they were injured.

(To the giving of which paragraph of the charge the defendants severally excepted and still except because the same does not correctly state the law or any law applicable to this case; is argumentative and prejudicial to defendants in that it places a false issue before the jury; that the same is not based on the evidence of the case and that no competent evidence of loss of profits was introduced in the case and because there is no evidence of the market value of the goods alleged to have been injured or destroyed or any of them.)

20.

839 You are instructed that, if you find the plaintiffs are entitled to any damages, you may take into consideration, if you think fit, the length of time which has elapsed since the damage occurred, and, if you think fit, give damages in the nature of interest over and above the property damages actually suffered by the plaintiffs.

(To the giving of which paragraph of the charge the defendants severally excepted and still except because the same does not correctly state the law and is prejudicial to the defendants.)

21.

The burden of proof is on the plaintiffs to establish the material allegations of their complaint, by a preponderance of the evidence.

That does not mean that they must offer more witnesses or a greater amount of testimony, but that in your belief the evidence they have offered on any particular subject, much or little, or whether from one witness or more, must to some extent outweigh that offered by the defendants on the same subject.

22.

If you believe from the evidence and all of the facts and circumstances in evidence that any of the parties to this cause had it in their power to produce evidence which from its nature would tend to prove with greater certainty any party of their contention, but have failed to do so, you have a right to presume from such failure that such evidence, if produced, would have made against the contention of the party having the power to produce it and failing to do so.

23.

It is your duty to carefully scrutinize and to dispassionately
840 weigh the testimony of all of the witnesses, giving to the several parts of the evidence such weight as in your judgment they should receive. You are not bound to accept as true any statement simply because it is sworn to by the greater number of witnesses; nor are you bound to accept the testimony of any witness as true, if for any good reason it appears unreliable or untrue. You have no right to reject the testimony of any of the witnesses, without good reason appearing in the evidence, which includes the appearance and manner of the witnesses when testifying as well as what they say.

24.

You are the sole judges of the weight of the evidence, and of the credibility of the witnesses. To determine what weight should be given to the testimony of any particular witness, you should take into consideration his apparent capacity for observing; and remembering and describing what he has seen and heard; his opportunity for knowing that of which he testifies should be also taken into account and you should especially consider whether he has any interest, bias or prejudice likely to affect his testimony. If you believe from the evidence in this case that any witness has such interest, bias or prejudice you should allow it such weight as you think proper to determine the value of his testimony.

25.

The arguments of counsel on either side are not evidence, nor are
they to be taken by you as correct statements of the evidence
841 for which you are to depend upon your memories, nor of the law which is to be given you by the court.

26.

You have no right to allow your prejudices or your sympathies or what may be the consequences of your decision to affect your

verdict, but you are bound by the oath you have taken to decide according to the evidence as you have heard it and the law as given to you by the court.

27.

You will have with you two forms for a verdict, by one of which you will find for the defendants, and, by the other, for the plaintiffs. In the latter will be a space for the amount of damages you may assess.

(To the giving of which paragraph of the charge the defendants severally excepted and still except for the reason that the court did not submit to the jury a form of verdict in which one of the defendants might be found liable in damages while the other might be found not guilty, and the jury should have been so instructed by the court.)

28.

Now, in addition to the verdict itself which you will have to render, you are to answer these questions, which the law permits to be put to you by parties to the suit.

Mr. Field, counsel for the defendant Barnett, here objects to this statement of the court, which appears in the record. Thereupon the court read to the jury certain questions, in writing, and then added:

I stated to you that these questions were propounded under
842 a right which the law gives to parties to submit such questions to juries: The portion of the law which relates to that is as follows: "In all trials by jury in the district courts, the court shall, at the request of the parties, or either of them, or their counsel, in addition to the general verdict, direct the jury to find upon particular questions of fact to be stated in writing by the party or parties requesting the same."

Upon retiring, you will choose a foreman and return your verdict signed by him in open court in your presence.

IRA A. ABBOTT, *Judge.*

Thereupon the defendant Barnett asked the court to instruct the jury as follows:

The defendant Barnett asks the court to instruct the jury to find the issues for the defendants.

But the court refused to give the said instruction, to which action of the court the defendant Barnett excepted and still excepts.

Thereupon the defendant Barnett asked the court to instruct the jury as follows:

The court instructs the jury that if they believe from the evidence that the wall of the building occupied by the plaintiffs fell because of any inherent defects in the wall itself, or because of the caving of lot number two, in block sixteen, they should find the issues for the defendants, notwithstanding they may believe from the evidence that such caving of lot number two, in block sixteen, was
843 occasioned by excavations made on lot number one, in block sixteen, which excavations deprived lot number two of the

lateral support heretofore furnished to it by lot number one prior to the excavation.

But the court refused to give the said instruction, to which action of the court the defendant Barnett excepted and still excepts

Thereupon the defendant Barnett asked the court to instruct the jury as follows:

The court instructs the jury that before the plaintiffs can recover in this action, they must satisfy the jury by a preponderance of the evidence that some of the injuries alleged in the complaint were occasioned by some wrongful act committed by the defendants, and it is not sufficient that the plaintiffs shall by evidence make it appear that some act of the defendants might have caused such injury, but on the contrary, the jury must be satisfied by a preponderance of the evidence that some act of the defendants did cause such injury or the plaintiffs cannot recover.

But the court refused to give the said instruction, to which action of the court the defendant Barnett excepted and still excepts.

Thereupon the defendant Barnett asked the court to instruct the jury as follows:

The court instructs the jury that there is no presumption that the wall of the building in question fell because of anything done by the defendants, or either of them and before the plaintiffs can recover in this case they must satisfy the jury by a preponderance of the evidence that the injuries alleged in the complaint
844 were in fact occasioned by some wrongful act committed by the defendants and not merely that they might have been so occasioned.

But the court refused to give the said instruction, to which action of the court the defendant Barnett excepted and still excepts.

Thereupon the defendant Barnett asked the court to instruct the jury as follows:

The court instructs the jury that the owner of a building lot in the city of Albuquerque, such as the lots referred to in the evidence in this case, owes no duty to the owner of an adjoining lot to furnish support for any building or structure which may be erected or standing on such adjoining lot, but it is the duty of every such owner to see to it, at his peril, that the foundations and walls of his structure are of a strength and stability sufficient to sustain themselves without lateral assistance from adjoining property.

But the court refused to give the said instruction, to which action of the court the defendant Barnett excepted and still excepts.

Thereupon the defendant Barnett asked the court to instruct the jury as follows:

The court instructs the jury that the defendant Barnett was not a party or privy to any contract between the plaintiffs and the defendant Weinman in relation to the building and structure mentioned and described in the lease in evidence; that this is not a suit for the recovery of damages growing out of the breach of any contract rights of the plaintiffs, but is a suit for wrongs alleged
845 to have been done by the defendants to the plaintiffs.

But the court refused to give the said instruction, to which action of the court the defendant Barnett excepted and still excepts

Thereupon the defendant Barnett asked the court to instruct the jury as follows:

The court instructs the jury that if they believe from the evidence that the defendant Barnett employed a competent architect to prepare plans and specifications for the construction of a building on lot number one, in block sixteen, of the original townsite of Albuquerque, and if the jury further believe from the evidence that the said defendant Barnett employed a competent person to erect a building and make excavations in accordance with the said plans and specifications, and if the jury further believe from the evidence that it was practicable to so erect and construct the said building in accordance to the said plans and specifications without injury to the plaintiffs in this case, then the plaintiffs cannot recover from the defendants, even though the contractor employed by the said defendant Barnett, in the execution of his contract, committed some act which amounted to a trespass upon the rights of the plaintiffs, but the remedy of the plaintiffs, if any, for such trespass, is against the contractor and not against the defendants in this case.

But the court refused to give the said instruction, to which action of the court the defendant Barnett excepted and still excepts.

Thereupon the defendant Barnett asked the court to in-
846 struct the jury as follows:

The court instructs the jury that they are not bound to accept as true the testimony of the plaintiff B. Ruppe, as to the quantity or value of the property lost or destroyed or injured by reason of the fall of the wall of said building, as testified to by the witnesses, but it is the duty of the jury to determine the amount and extent of the loss of the plaintiffs, if any, from all the evidence in the case and from their general knowledge of human affairs, and if the jury believe from the evidence that the plaintiff B. Ruppe has suppressed any fact in connection with the value or quantity of goods lost, or has attempted to exaggerate in any manner the extent of his loss, they have the right to take such fact into consideration in determining the extent of the plaintiff's damages. In no event can the plaintiffs recover in this case a sum in excess of the actual damages suffered and sustained by them, which damage must be directly attributable to some wrongful act on the part of the defendants, and before the plaintiffs can recover any damages against the defendants they must satisfy the jury by a preponderance of the evidence that such damages were occasioned by some wrong on the part of the defendants. It is not sufficient that they shall show that some wrongful act on the part of the defendants might have occasioned the damages.

But the court refused to give the said instruction, to which action of the court the defendant Barnett excepted and still excepts.

Thereupon the defendant Barnett asked the court to in-
847 struct the jury as follows:

The court instructs the jury that in assessing the plaintiffs' damages they can allow nothing for the injury to goods by reason of their being rendered unsalable, as testified to by the witness Ruppe, because there is no legal evidence of such damages, and the statement

by said witness that such damage amounted to the sum of five hundred dollars is sufficient in law to warrant a finding by the jury that any such damage was so suffered.

But the court refused to give the said instruction, to which action of the court the defendant Barnett excepted and still excepts.

Thereupon the defendant Barnett asked the court to instruct the jury as follows:

The court instructs the jury that if they believe from the evidence that the plaintiffs, or either of them, with full knowledge of the terms of the party wall agreement, encouraged the defendants to proceed with the execution of the said agreement, and did not object to the excavation being made on lot number two, in pursuance of the said agreement, then and in that case the plaintiffs are estopped to claim that such excavation on lot number two by the defendants, if made, was a trespass upon their rights as tenants of the said lot.

But the court refused to give the said instruction, to which action of the court the defendant Barnett excepted and still excepts.

Thereupon the defendant Barnett asked the court to instruct the jury as follows:

848 The court further instructs the jury that the plaintiffs claim damages from the defendants for injury to and destruction of personal property, and for an injury to their estate in lot number two, in block sixteen, of the original townsite of Albuquerque, described in the complaint, that the estate of the plaintiffs in the said lot number two, in block sixteen, was an estate for years subject to be terminated by default in payment of the rent reserved by the terms of said lease; that it is admitted by the pleadings that the plaintiffs failed to pay an installment of the rent reserved at the — when the same became due, and the defendant Weinman by reason of such default in the payment of said rent became entitled to reenter and take possession of the said premises; that the plaintiffs can recover from the defendants, if at all, no damages to their interest in the said real estate which accrued subsequent to the termination of their estate therein as defined in this instruction.

But the court refused to give the said instruction, to which action of the court the defendant Barnett excepted and still excepts.

Thereupon the defendant Barnett asked the court to instruct the jury as follows:

The court instructs the jury, that while the owner of the fee in real estate is entitled to dominion over the same from the dome of the heavens to the center of the earth, the right of the tenant for years is not necessarily coextensive with that of the owner of the fee, but the right of such tenant, unless expressly enlarged by the terms of the grant, is limited to the use and occupation of the

849 demised premises in the condition in which they are at the time possession is received, and in this case a lateral excavation below the surface of the earth, extending a short distance below the property line between lot number one and lot number two, if any such excavation was made, was not necessarily a trespass upon the rights of the plaintiffs, and the plaintiffs cannot recover in

this action for any such excavation, even if the jury shall believe that such excavation was made, unless they shall satisfy the jury by a preponderance of the evidence that such excavation was the proximate cause of the destruction of the wall of the building occupied by the plaintiffs.

But the court refused to give the said instruction, to which action of the court the defendant Barnett excepted and still excepts.

Thereupon the defendant Barnett asked the court to instruct the jury as follows:

The court instructs the jury that the plaintiffs, under the lease offered in evidence by them, were bound to pay rent for the premises described therein, notwithstanding the destruction of the building upon the said premises by the wrongful act of the defendants or their employees; that a refusal of the plaintiffs to pay such rent, when the same by the terms of the lease became due and payable authorized the defendant Weinman to re-enter and take possession of the said premises without process of law, and the estate of the said plaintiffs in the said premises became and was terminated by said re-entry for the non-payment of rent, which non-payment of
850 rent is admitted by the pleadings in this case.

But the court refused to give the said instruction, to which action of the court the defendant Barnett excepted and still excepts.

Thereupon the defendant Barnett asked the court to instruct the jury as follows:

The court instructs the jury that there was no evidence in this case that it was necessary for the plaintiffs to remove to the premises to which they did remove, or that such premises were at the time of removal suitable for the business which the plaintiffs proposed to carry on therein, or that plaintiffs might not have obtained other premises more suitable to their purposes and where their business would have been more profitable, and there is no evidence that the plaintiffs made any effort to find premises where they could carry on their business with the same profit as had been made in the Ruppe building, and there is no evidence that suitable premises might not have been obtained in the immediate vicinity of the place where plaintiffs had previously carried on business, and therefore the jury should disregard all evidence as to the loss of profits by the plaintiffs in this case.

But the court refused to give the said instruction, to which action of the court the defendant Barnett excepted and still excepts.

Thereupon the defendant Barnett asked the court to instruct the jury as follows:

The court instructs the jury that this is an action of tort in which the plaintiffs seek to recover damages for loss and damages
851 to certain goods, wares and merchandise, as well as damages to loss of profits, which the plaintiffs claim they would have made but for the wrong of the defendants. You are instructed that if you find for the plaintiffs, you may, if you see fit to do so, give damages in the nature of interest over and above the value of the goods at the time of the injury, but you are not bound to do so and

you are not at liberty to award to the plaintiffs interest to any other extent or on any other account.

But the court refused to give the said instruction, to which action of the court the defendant Barnett excepted and still excepts.

Thereupon the defendant Weinman asked the court to instruct the jury as follows:

The defendant Weinman requests the court to instruct the jury to find a verdict for defendants.

But the court refused to give the said instruction, to which action of the court the defendant Weinman excepted and still excepts.

Thereupon the defendant Weinman asked the court to instruct the jury as follows:

The defendant Weinman requests the court to instruct the jury to find the defendants not guilty of the trespasses charged in the said complaint.

But the court refused to give the said instruction, to which action of the court the defendant Weinman excepted and still excepts.

Thereupon the defendant Weinman asked the court to instruct the jury as follows:

The court instructs the jury that while there is incident to land in its natural condition a right to support from the adjoining
852 land, nevertheless if the land sinks and falls away in consequence of the removal of such support and such sinking and falling away is caused by artificial pressure of the building or wall upon the same, the owner is not entitled to damages, and that although they may believe from the preponderance of the evidence that the defendants caused an excavation to be made upon the lot adjoining lot number two, occupied by the plaintiffs as lessees, if they further believe that the earth on said lot number two occupied by the plaintiffs as aforesaid, sank and fell away on account of the pressure of the wall upon the same, then the plaintiffs are not entitled to recover and they should find a verdict in favor of the defendants.

But the court refused to give the said instruction, to which action of the court the defendant Weinman excepted and still excepts.

Thereupon the defendant Weinman asked the Court to instruct the jury as follows:

The Court further instructs the jury that the defendant Barnett was under no obligation to maintain a wall on the west line of lot number one, but had a right to remove the same, and if the jury believe from the preponderance of the evidence that after the removal of the same the wall of the building occupied by the plaintiffs fell because of the removal of the said wall by said defendant Barnett on the adjoining lot, or by reason of any inherent defect in the wall of the building occupied by the said plaintiffs, then the plaintiffs are not entitled to recover and they should find a verdict in favor of the defendants.

853 But the Court refused to give the said instruction, to which action of the Court the defendant Weinman excepted and still excepts.

Thereupon the defendant Weinman asked the Court to instruct the jury as follows:

The Court further instructs the jury that the defendant Weinman had a perfect right to enter into the party wall agreement offered in evidence in this cause, and that there was nothing unlawful in the making of the same and the mere making of the said agreement would not render the defendant Weinman guilty of any trespass, and that the said agreement on its face does not contemplate or call for any unlawful act or any trespass upon the lot occupied by the plaintiffs or any injury to the building occupied by the plaintiffs on said lot number two.

But the Court refused to give the said instruction, to which action of the Court the defendant Weinman excepted and still excepts.

Thereupon the defendant Weinman asked the Court to instruct the jury as follows:

The Court further instructs the jury that the said party wall agreement offered in evidence did not contemplate by its terms that the said defendant Weinman should himself take any part or have any direction or control in the carrying out of the said agreement and the erection of the party wall called for thereby, and that if they further believe from the preponderance of the evidence that the said Weinman did not direct or have any control in the carrying out of the said agreement or the doing of the excavation on said lot number one, done by the said defendant
854 Barnett or by the said Grande under any contract with the said Barnett, but that the same was done without any direction, control or supervision of the said defendant Weinman, then the said defendant Weinman is not liable and they should find the issues in his favor.

But the Court refused to give the said instruction, to which action of the Court the defendant Weinman excepted and still excepts.

Thereupon the defendant Weinman asked the Court to instruct the jury as follows:

The Court further instructs the jury that if they find from a preponderance of the evidence that the plaintiffs, or B. Ruppe, one of the plaintiffs, knew of the proposed erection of the said party wall on lot number one and that it was to be placed on the line, as called for by the said agreement entered into by and between the said defendants Barnett and Weinman, and stood by and did not object to the same but acquiesced in the erection of the same, that such continued acquiescence and standing by, with knowledge of the facts and the manner in which it was proposed that the said party wall should be erected, is equivalent to a consent, although they may further believe from the preponderance of the evidence that the excavation extended over the line between the two adjoining lots, numbered one and two, nevertheless the said plaintiffs would not be entitled to recover, and they should find a verdict in favor of the defendants.

But the Court refused to give the said instruction, to
855 which action of the Court the defendant Weinman excepted and still excepts.

Thereupon the defendant Weinman asked the Court to instruct the jury as follows:

The Court further instructs the jury that if they believe from the preponderance of the evidence, although they may believe that the said party wall agreement was entered into by and between the said defendants Barnett and Weinman, still if they further believe that nothing was ever done under the said party wall agreement by the said Barnett, except upon his own lot number one, then the defendants would not be liable and the plaintiffs are not entitled to recover in this action and the jury should find a verdict in favor of the defendants.

But the Court refused to give the said instruction, to which action of the Court the defendant Weinman excepted and still excepts.

Thereupon the defendant Weinman asked the Court to instruct the jury as follows:

The Court further instructs the jury that by the terms of the said party wall agreement the defendant Weinman was not to become the owner of half of said wall until he used the said wall, after it was constructed, and paid half of the cost thereof; and that the said party wall agreement as between the said defendants Weinman and Barnett merely gave the said Barnett license to erect the said party wall upon the said line of said property and that it specified no time within which the said wall was to be erected, and did not authorize and could not render the said Weinman liable
856 to responsible for any injury done to the building occupied by the plaintiffs, or the stock or merchandise, resulting from anything done for the purpose of erecting the said party wall under the said agreement, and unless they believe from the evidence that defendant Weinman actually took part in directing and causing said excavation to be made they should find the issues in favor of the said defendant Weinman and that he is not guilty.

But the Court refused to give the said instruction, to which action of the Court the defendant Weinman excepted and still excepts.

Thereupon the defendant Weinman asked the Court to instruct the jury as follows:

The Court further instructs the jury that if they believe from the preponderance of the evidence that the defendant Weinman demanded the payment of the rent due in accordance with the terms of the lease, on the fifteenth day of July, or any time after the first of July, 1902, for the month beginning with the said first day of July, 1902, and the said plaintiffs failed and refused to pay the said rent so demanded, that then the said lease became forfeited by its terms, and the said plaintiffs no longer had any right to occupy the said premises and are not entitled to recover for the value of the unexpired term of said lease, or any interest therein.

But the Court refused to give the said instruction, to which action of the Court the defendant Weinman excepted and still excepts.

Thereupon the defendant Weinman asked the Court to instruct the jury as follows:

The jury are further instructed that by the terms of the
857 said lease, the plaintiffs entered into possession of the said property and acknowledged that they received the same in good repair and that they would keep the same in good repair during the term of said lease, and that although they may believe from the evidence that the building upon said premises became untenantable for the purposes for which the plaintiffs occupied the same, and that even if they believe that the same became so untenantable by reason of the acts of the said defendant Barnett and said Grande in pursuance of the said party wall agreement made between the said defendants Barnett and Weinman, yet such acts would only amount to a trespass and would not amount to an eviction from the premises of the said plaintiffs, and would not authorize or justify the plaintiffs in refusing to pay the rent as provided for in said lease, and that although such trespass may have been committed and the building rendered untenantable in manner as above stated, and if they believe from the preponderance of the evidence that plaintiffs refused and failed to pay the month's rent, the payment whereof was demanded, on the first day of July, 1902, or any time during said month of July, for the said month of July, and that the same remained unpaid, such refusal and failure to pay the said rental would work a termination of said lease.

But the Court refused to give the said instruction, to which
858 action of the Court the defendant Weinman excepted and still excepts.

Thereupon the defendant Weinman asked the Court to instruct the jury as follows:

The jury are further instructed that profits made in business are not a proper element of damages; that they are too remote, and the jury should not take into consideration the evidence offered upon the trial of this cause as to the probable profits or the difference that the plaintiffs would have made had the building not fallen and plaintiffs remained in possession thereof, or the difference between such estimated profits and the profits which the plaintiffs claim they did make in the new place of business to which they removed their stock.

But the Court refused to give the said instruction, to which action of the Court the defendant Weinman excepted and still excepts.

Thereupon the defendant Weinman asked the Court to instruct the jury as follows:

The Court further instructs the jury that the plaintiffs are only entitled to recover, in any event, the actual damages sustained by reason of the falling of the said wall, and that it is incumbent upon the plaintiffs to furnish sufficient evidence of the damages so sustained, and that mere conjecture or guess as to the amount of damage done to the goods which were injured but were not destroyed at the time the wall of said building fell, did not furnish a basis upon which the jury can determine the extent to which the value of damaged goods was impaired by such injury.

But the Court refused to give the said instruction, to which
859 action of the Court the defendant Weinman excepted and still excepts.

Thereupon the defendant Weinman asked the Court to instruct the jury as follows:

The Court instructs the jury that although they may believe from the evidence that the party wall agreement in evidence was executed between the defendants Barnett and Weinman, yet if they further believe from the evidence that the party wall, to be erected, in accordance with the terms of said agreement, could have been erected in accordance with the plans and specifications in evidence, according to which under the terms of said contract the said wall was to be erected, by the exercise of ordinary care, without causing the wall of the building occupied by the plaintiffs to fall, and that the defendant Weinman took no part personally in directing or controlling the making of the excavation preparatory to the erection of the said wall, then the jury should find a verdict in favor of the said defendant Weinman.

But the Court refused to give the said instruction, to which action of the Court the defendant Weinman excepted and still excepts.

Thereupon the defendant Weinman asked the Court to instruct the jury as follows:

The jury are further instructed: If you believe from the evidence that the party wall agreement in evidence in this cause, was made between the defendants Barnett and Weinman, yet if you believe that the said party wall was never erected and nothing was done towards the erection of said party wall, except what
860 was done on the lot of the said defendant Barnett, then you should find a verdict in favor of the defendants.

But the Court refused to give the said instruction, to which action of the Court the defendant Weinman excepted and still excepts.

Thereupon the defendant Weinman asked the Court to instruct the jury as follows:

The jury are further instructed, that the defendant Barnett had a right to remove the wall on his own lot, and if you believe from the preponderance of the evidence that the wall of the building occupied by the plaintiffs fell, by reason of the removal of the wall next to it on lot number one, belonging to the defendant Barnett, then you should find a verdict in favor of the defendants.

But the Court refused to give the said instruction, to which action of the Court the defendant Weinman excepted and still excepts.

Thereupon the defendant Weinman asked the Court to instruct the jury as follows:

The Court further instructs the jury that this is not a suit on the lease against the defendant Weinman for a disturbance of the quiet enjoyment of the premises leased to the plaintiffs, but a suit in trespass, and the rights of the plaintiffs as against the defendant Weinman are to be determined just as if Weinman was no party to the lease.

But the Court refused to give the said instruction, to which action of the Court the defendant Weinman excepted and still
861 excepts.

Thereupon the defendant Weinman asked the court to instruct the jury as follows:

The jury are further instructed that if they believe from the preponderance of the evidence, that one of the plaintiffs, B. Ruppe, stood by, knowing the kind of wall that was to be erected, where it was to be placed, and the manner in which the same was to be erected, and acquiesced in the erection of the same, and by his conduct led the defendants to believe that he acquiesced and consented to the erection of the same, as it was proposed to be erected, then the plaintiffs are estopped from complaining that the excavation was made for the purpose of erecting said wall, which excavation was made by the contractor, Grande, under the contract between the defendant Barnett and the said Grande, in evidence, and if the wall of the building occupied by the plaintiffs fell by reason of the want of care of said Grande, then plaintiffs are not entitled to recover, and you should find a verdict in favor of the defendants.

But the Court refused to give the said instruction, to which action of the Court the defendant Weinman excepted and still excepts.

Thereupon the defendant Weinman asked the Court to instruct the jury as follows:

You are instructed that under the laws of the Territory, a partnership is required to keep their books in due form, with an inventory of their stock and capital, keeping an account of all business they transact, and that if the jury find that such an ac-
862 count has not been kept and presented in this case, that in that case there is no legal evidence of the profits of the plaintiffs upon which a verdict for loss or profits can be sustained.

But the Court refused to give the said instruction, to which action of the Court the defendant Weinman excepted and still excepts.

Thereupon the defendant Weinman asked the Court to instruct the jury as follows:

The defendant Weinman asks the Court to instruct the jury that he cannot be held for damages unless it is shown that the wall fell solely from an excavation made under the party wall agreement and from no other cause, and that it must further appear that plaintiff Ruppe did not acquiesce in such excavation.

But the Court refused to give the said instruction, to which action of the Court the defendant Weinman excepted and still excepts.

And thereupon the jury retired to consider their verdict, taking with them certain interrogatories submitted to them, which with the answers thereto are hereinafter set forth:

And the jury, having considered their verdict, returned into Court the following verdict:

We the jury find the issues for the plaintiffs and assess their damage at five thousand dollars, at six per cent interest.

DIEGO P. ARMIJO, *Foreman.*

And thereupon the following proceedings were had:

863 Mr. WOOD: One moment in that connection——

The COURT: The interpreter will read the verdict in Spanish.

Thereupon the interpreter read the verdict in Spanish.

The COURT: Is that your verdict, gentlemen?

Jurors answer yes.

Mr. WOOD: If the Court please, we move that the jury be sent back to reconsider their verdict and compute the interest on the form as rendered, as it cannot be received as it *it*. It is for them to compute what interest—or damages in the nature of interest they consider the plaintiffs entitled to recover, and to render their verdict for the result; it canno- be received in the form in which it is rendered.

Mr. FIELD: We think the Court better receive the communication of the jury; we have not heard the answers to the special questions read yet.

The COURT: I suppose they have answered, but of course they have not been read as yet.

Mr. WOOD: Our motion is that the verdict cannot be received in the form rendered and that it should be returned to them to make it conform to the requirements, before any of it is received, it appearing that the general verdict is not in proper form.

864 The COURT: I think we will go on and read the questions and answers.

Thereupon the clerk read the special questions and answers thereto, which are as follows, to-wit:

I.

Did the plaintiffs have reasonable grounds for apprehension that the wall of the building occupied by them might fall as the result of excavation being made in lot number one?

No, sir.

DIEGO P. ARMIJO, *Foreman.*

II.

Could the plaintiffs by the use of means reasonably within their reach, have protected themselves from damage by the falling of the wall of the building occupied by them?

No, sir.

DIEGO P. ARMIJO, *Foreman.*

III.

What if anything did the plaintiffs do, toward protecting themselves from loss or damage to their property by the falling of the wall of the building occupied by them?

No, sir.

DIEGO P. ARMIJO, *Foreman.*

IV.

Ought the plaintiffs as reasonable men have anticipated the fall of the wall of the building occupied by them?

Yes, sir.

DIEGO P. ARMIJO, *Foreman.*

V.

Did the excavation under the foundation at the northeast corner of the building occupied by plaintiffs cause the crack in the wall at the top and fifty-three feet south of the corner of said wall described by the witnesses?

865 Yes, sir.

DIEGO P. ARMIJO, *Foreman.*

VI.

Was the east wall of the building occupied by plaintiffs out of plumb, if so what extent?

It was, about two inches.

DIEGO P. ARMIJO, *Foreman.*

VII.

Did the east wall of the building occupied by plaintiffs bulge lengthwise, about two and one-half feet above the foundation, for its full length back to the point where the wall broke?

No, sir.

DIEGO P. ARMIJO, *Foreman.*

VIII.

Was the first indication of weakness in the wall which fell manifested by a crack at the top of the wall fifty-three feet south of the northeast corner of the building?

No, sir

DIEGO P. ARMIJO, *Foreman.*

IX.

Was there any other crack or break in the wall which fell apparent at any time before the wall actually fell?

No, sir.

DIEGO P. ARMIJO, *Foreman.*

X.

State how much of the foundation under the wall that fell remained in place; how much of said foundation was displaced and to what extent any part of said foundation was displaced?

About one-fourth of it fell on the excavation and the rest of it remained on its place.

DIEGO P. ARMIJO, *Foreman.*

XI.

Was the fall of the wall of the building occupied by plain-

866 tiffs caused in any degree by lack of lateral support for the ground on which it stood?

No, sir.

DIEGO P. ARMIJO, *Foreman.*

XII.

Was there any excavation under the foundation of the wall of the building occupied by plaintiffs except the one at the northeast corner of the building?

Yes, sir.

DIEGO P. ARMIJO, *Foreman.*

XIII.

Was there any excavations on lot number one which were not under the foundation of the building occupied by plaintiffs but were flush with the wall; if so, how many such excavations were there; how deep was each and where was each of them located?

Yes, sir. There were two; the first one was about 25 feet south and about two and ½ feet deep, and the 2nd was about 50 feet south from the front and about 3 feet deep.

DIEGO P. ARMIJO, *Foreman.*

The COURT: Gentlemen of the jury, are these answers to the questions as read, your answers to such questions?

Jurors answer: yes, sir.

Mr. WOOD: Now, we renew our application that the jury be instructed that the verdict—the general verdict in favor of the plaintiffs cannot be received in the present form as rendered, but they must compute the interest on the amount allowed and return their verdict for such lump sum—that the Court cannot compute
867 the interest at their suggestion, but they must do it.

Mr. FIELD: To which we object, and insist that the jury has fulfilled its function in this case and the Court has not power to recommit it to them, and has no power to do anything in the matter except to receive the verdict in the form rendered.

(The Court here submits a memorandum to counsel Mr. Field.)

And Mr. Field said:

If this memorandum is what your Honor contemplates saying I wish to have an exception to it. Our position is that the Court has no power to do anything except to receive this verdict returned by the jury: The question of the legal effect of it is for future consideration.

The COURT: It is almost twelve o'clock. I do not wish to do this without consideration—I will let the jury go to dinner.

Mr. FIELD: Will you let this jury separate?

The COURT: No; not separate: They will go in charge of their bailiffs.

The COURT: Gentlemen of the jury——

Mr. FIELD (interrupting): In order that there may be no misunderstanding—I object to the Court saying anything to this jury at this time except that they may go and have their dinner.
868 The COURT: That is all I propose doing.

Mr. FIELD: I have no objection to that.

The COURT (to jury): It is now almost twelve o'clock and you

will go to your dinner together, and the Court will deal further with the matter at 1:30—the bailiffs will have charge of the jury, just the same.

Thereupon a recess was taken until 1:30 o'clock P. M.

And at 1:30 P. M. the Court instructed the jury further in writing, as follows:

GENTLEMEN: If by the verdict you have brought in assessing the plaintiffs' damages against the defendants at five thousand dollars with six per cent interest, you mean that something in the nature of interest up to the present time be added to the sum of five thousand dollars you name, you shall yourselves determine the amount, under the instructions given you, and it will be the better way to add it to whatever other sum you may find, so as to make one total. The Court has no right to make the computation or determination for you. If it is not your intention to add anything in the nature of interest up to the present time, to said sum of five thousand dollars, you should make your meaning clear by your verdict.

Another blank form for a verdict will be furnished you to be filled out and returned as you have been instructed.

Following which instructions the Court—:

The COURT (to jury): I will add if there is anything about
869 , the law of the matter which you do not understand, you may ask the Court for further instructions.

Mr. MANN: To which remark of the Court the defendants except. The defendants, Weinman and Barnett each for himself excepts to the action of the Court refusing to receive the verdict heretofore rendered by the jury as rendered by them and to the action of the Court in returning the jury to the jury room for further deliberation, on the ground that the Court has no power to do so. The defendants, Jacob Weinman and Joseph Barnett object to the giving of this instruction by the Court, or any other instruction at this time for the reason that the general verdict returned by this jury is plain and does not require any explanation and should be received by the Court as it stands, for the further reason there is no authority of law for the Court giving the jury any instructions at this time; the instructions formerly given by the Court on his own motion with reference to what the jury might do in finding damages in the nature of interest having been plain and requiring no explanation, and for the further reason that the Court has no power or authority to do anything but to accept and receive the verdict as rendered by the jury.

The COURT: The objection is overruled.

Mr. MANN: I desire an exception on behalf of defendant Weinman.

870 Mr. JAMISON: And we except on behalf of the defendant Barnett.

Mr. MANN: I wish to add to my objection: the defendants further object for the reason that the verdict heretofore rendered was plain and unambiguous and no explanation thereof was necessary: It was a legal verdict and should have been received by the Court as such.

Thereupon the jury again retired to their jury room.

And at 3:30 P. M. again come the jury.

The CLERK: Gentlemen of the jury, have you arrived at a verdict?

The FOREMAN: Yes, sir.

The COURT: Hand it up.

Thereupon the following was read:

We, the jury, find the issues for the plaintiffs and assess their damages at seven thousand seven hundred & 38 dollars in total amount.

DIEGO P. ARMIJO, *Foreman.*

Gentlemen of the jury, is that your verdict?

FOREMAN: Yes.

Mr. MANN: Defendants Barnett and Weinman object to the receiving of this verdict by the Court, for the reason that the jury has already heretofore returned a verdict in this Court, which
871 was a legal verdict, and because there is no authority in law for the verdict which has just been rendered.

The COURT: Anything further?

Mr. MANN: An exception for both defendants.

And thereupon the Court discharged the jury from further consideration of the case.

Mr. MANN: Both defendants give notice of a motion to set aside the verdict and for a new trial.

And thereupon, within the time prescribed by law, defendant Barnett filed a motion for a new trial, which is in words and figures as follows, to-wit:

Motion of Defendant Barnett for a New Trial.

Comes now the defendant Joseph Barnett, by Neill B. Field, his attorney, and moves the Court to set aside the verdict of the jury heretofore rendered in this case, and grant him a new trial therein, for the following reasons:

I.

Because the verdict is against the law.

II.

Because the verdict is against the evidence.

III.

Because the verdict is against the law and the evidence.

IV.

Because the court admitted improper and illegal evidence
872 over the objection of the defendants.

V.

Because the Court refused to admit proper and legal evidence offered by the defendants.

VI.

Because the Court refused to instruct the jury as requested by this defendant.

VII.

Because the Court refused to instruct the jury as requested by his co-defendant Weinman.

VIII.

Because the Court improperly instructed the jury of its own motion.

IX.

Because the Court improperly instructed the jury at the request of the plaintiffs.

X.

Because the Court refused to accept the general verdict of the jury when the same was originally returned into court by the jury, but ordered the jury to return to their rooms and render a different verdict, although the verdict as returned was of and in itself, definite, certain and sufficient in law to support a judgment.

XI.

Because it appears from the answers of the jury to the special interrogatories propounded to them, that the general verdict of the jury should have been for the defendants and not for the plaintiffs.

XII.

Because the damages assessed by the jury are grossly excessive and indicate that the jury was influenced by ignorance,
873 passion or prejudice against the defendants.

XIII.

Because the Court refused to direct a verdict in favor of the defendants, and each of them, at the close of the plaintiffs' case.

XIV.

Because the Court refused to direct a verdict in favor of the defendants, and each of them, at the close of all the evidence.

XV.

Because the case of the defendants was prejudiced by the attitude and action of the trial judge during the progress of the trial, and by reason of comment by the trial judge upon the conduct of counsel for the defendants, and upon the nature of the evidence in the case, the defendants were prevented from having a fair and impartial trial. The said defendants by way of specifications of the matters set forth in the foregoing grounds for a new trial specially assign the following actions of the Court as prejudicial to his rights and as entitling him to a new trial: That is to say:

XVI.

The Court permitted the witness Ruppe to estimate the amount of his gross prpofits at forty per cent of the gross receipts. Permitted him to give evidence of his conclusions from written instruments voluntarily destroyed by him; Permitted the plaintiffs to put in evidence as books of account, an imperfect mutilated and defaced portion of a set of books which furnished no data upon which to
874 base an estimate of the loss of profits, if any, of the plaintiffs, although it affirmatively appeared that the said Ruppe had destroyed his pass book, checks, check book, invoices and the other documentary evidence in his possession. The Court also permitted the witness Ruppe to refresh his recollection by the use of the bill of particulars on file in the case, although no proper foundation was laid for that purpose, and it affirmatively appeared that the bill of particulars was made months after the transaction to which it related, and that the witness Ruppe did not know at the time it was made, that it was correct, and the witness Ruppe testified that the invoices from which the original entries of the loss of goods had been estimated by him, had been by him voluntarily destroyed.

XVII.

Because there was no legal evidence in the case of any damage to the plaintiffs, except as to the electric piano and a few other items of fixtures, as to the loss of which the witness Ruppe was able to testify from memory and without the aid of the bill of particulars.

XVIII.

Because there was no legal evidence in the case which authorized the Court to submit to the jury, or the jury to find, in favor of the plaintiffs, damages for loss of profits or for damaged goods not totally destroyed.

XIX.

Because the Court should have excluded from the consid-
875 sideration of the jury all evidence as to the removal of the stock of goods of plaintiffs, to the Grant building or the Armijo building, and of evidence as to the volume of business transacted in these places.

XX.

Because the Court should have excluded from the consideration of the jury all evidence as the Ruppe's estimate of the expenses of the business carried on by plaintiffs, and the percentage of the gross profits derived therefrom.

XXI.

Because the rulings of the Court on the admission and rejection of evidence were inconsistent with each other and were highly prejudicial to the defendants.

XXII.

Because the Court erred in giving to the jury Paragraph No. 1 of the charge of the Court. Because the same does not correctly state the issues in the case, but ignores the defense that the wall of the plaintiffs' building fell because of inherent defects in its construction, etc.

XXIII.

Because the Court erred in Paragraph six of its charge to the jury.

XXIV.

Because the Court erred in Paragraph No. 8 of its charge to the jury.

XXV.

Because the Court erred in Paragraph No. 13 of its charge to the jury.

XXVI.

Because the Court erred in Paragraph No. 14 of its charge
876 to the jury.

X-VII.

Because the Court erred in Paragraph No. 15 of its charge to the jury.

XXVIII.

Because the Court erred in Paragraph No. 17 of its charge to the jury.

XXIX.

Because the Court erred in Paragraph No. 18 of its charge to the jury.

XXX.

Because the Court erred in Paragraph No. 20 of its charge to the jury.

XXXI.

Because the Court erred in Paragraph No. 27 of its charge to the jury.

XXXII.

Because the Court refused to give to the jury Instruction No. 1 asked by the defendant Barnett.

XXXIII.

Because the Court refused to give to the jury Instruction No. 2 asked by the defendant Barnett and failed to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

XXXIV.

Because the Court refused to give to the jury Instruction No. 3 asked by the defendant Barnett and failed to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

XXXV.

Because the Court refused to give to the jury Instruction
877 No. 4 asked by the defendant Barnett and failed to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

XXXVI.

Because the Court refused to give to the jury Instruction No. 5 asked by the defendant Barnett and failed to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

XXXVII.

Because the Court refused to give to the jury Instruction No. 6 asked by the defendant Barnett and failed to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

XXXVIII.

Because the Court refused to give to the jury Instruction No. 7 asked by the defendant Barnett and failed to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

XXXIX.

Because the Court refused to give to the jury Instruction No. 8 asked by the defendant Barnett and failed to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

XL.

Because the Court refused to give to the jury Instruction No. 9 asked by the defendant Barnett and failed to endorse his refusal thereon and sign the same as required by the statute in such
878 cases made and provided.

XLI.

Because the Court refused to give to the jury Instruction No. 10 asked by the defendant Barnett and failed to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

XLII.

Because the Court refused to give to the jury Instruction No. 11 asked by the defendant Barnett and failed to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

XLIII.

Because the Court refused to give to the jury Instruction No. 12 asked by the defendant Barnett and failed to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

XLIV.

Because the Court refused to give to the jury Instruction No. 13 asked by the defendant Barnett and failed to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

XLV.

Because the Court refused to instruct the jury as requested by the defendant Weinman.

XLVI.

Because the Court, after the jury had returned into court a complete verdict, refused to accept the same and gave to the jury the following instructions:

879 If by the verdict you have brought in assessing the plaintiffs' damages against the defendants at five thousand dollars with six per cent interest, you mean that something in the nature of interest up to the present time be added to the sum of five thousand dollars you name, you should yourselves determine the amount, under the instructions given you, and it will be the better way to add it to whatever other sum you may find, so as to make one total. The court has no right to make the computation or determination for you. If it is not your intention to add anything in the nature of interest up to the present time to said sum of five thousand dollars, you should make your meaning clear by your verdict.

XLVII.

Because for divers other reasons occurring at the said trial whereby the said defendant was prevented from having a fair and impartial trial in said cause.

Also the defendant Weinman, within the time prescribed by law, filed his motion for new trial, which is in words and figures as follows, to-wit:

Motion of Defendant Weinman for a New Trial.

Comes now the defendant Jacob Weinman, by Edward A. Mann, his attorney, and moves the Court to set aside the verdict of the jury heretofore rendered in this case, and grant him a new trial therein, for the following reasons:

880 I.

Because the verdict is against the law.

II.

Because the verdict is against the evidence.

III.

Because the verdict is against the law and the evidence.

IV.

Because the Court admitted improper and illegal evidence over the objection of the defendants.

V.

Because the Court refused to admit proper and legal evidence offered by the defendants.

VI.

Because the Court refused to instruct the jury as requested by this defendant.

VII.

Because the Court refused to instruct the jury as requested by his co-defendant Barnett.

VIII.

Because the Court improperly instructed the jury of its own motion.

IX.

Because the Court improperly instructed the jury at the request of the plaintiffs.

X.

Because the Court refused to accept the general verdict of the jury when the same was originally returned into court by the jury, but ordered the jury to return to their rooms and render a different verdict, although the verdict as returned was of and in itself, definite, certain and sufficient in law to support a judgment.

881 XI.

Because it appears from the answers of the jury to the special interrogatories propounded to them, that the general verdict of the jury should have been for the defendants and not for the plaintiffs.

XII.

Because the damages assessed by the jury are grossly excessive and indicate that the jury was influenced by ignorance, passion or prejudice against the defendants.

XIII.

Because the Court refused to direct a verdict in favor of the defendants, and each of them, at the close of the plaintiffs' case.

XIV.

Because the Court refused to direct a verdict in favor of the defendants, and each of them, at the close of all the evidence.

XV.

Because the case of the defendants was prejudiced by the attitude and action of the trial judge during the progress of the trial, and by reason of comment by the trial judge upon the conduct of counsel for the defendants, and upon the nature of the evidence in the case, the defendants were prevented from having a fair and impartial trial. The said defendant by way of specification of the matters set forth in the foregoing grounds for a new trial, especially assigns the following action of the Court as prejudicial to his rights and as entitling him to a new trial. That is to say:

882 XVI.

The Court permitted the witness Ruppe to estimate the amount of his gross profits at forty per cent of the gross receipts; permitted him to give evidence of his conclusions from written instruments voluntarily destroyed by him; permitted the plaintiffs to put in evidence as books of accounts, an imperfect, mutilated and defaced portion of a set of books which furnished no data upon which to base an estimate of the loss of profits, if any, of the plaintiffs, although it affirmatively appeared that the said Ruppe had destroyed his pass book, checks, check book, invoices and the other documentary evidence in his possession. The Court also permitted the witness Ruppe to refresh his recollection by the use of the bill of particulars on file in

the case, although no proper foundation was laid for that purpose, and it affirmatively appeared that the bill of particulars was made months after the transaction to which it related, and that the witness Ruppe did not know at the time it was made, that it was correct, and the witness Ruppe testified that the invoices from which the original entries of the loss of goods had been estimated by him, had been by him voluntarily destroyed. And the Court also permitted the defendant Ruppe, over the objection of defendants, to state orally his expenses from memory for the entire period of the lease, when his testimony showed that said Ruppe had voluntarily destroyed the best evidence thereof.

XVII.

883 Because there was no legal evidence in the case of any damage to the plaintiffs, except as to the electric piano and a few other items of fixtures, as to the loss of which the witness Ruppe was able to testify from memory and without the aid of the bill of particulars, and as to those items no legal evidence as to their value was submitted.

XVIII.

Because there was no legal evidence in the case which authorized the Court to submit to the jury, or the jury to find, in favor of the plaintiffs, damages for loss of profits or for damaged goods not totally destroyed.

XIX.

Because the Court should have excluded from the consideration of the jury all evidence as to the removal of the stock of goods of plaintiffs, to the Grant building or the Armijo building, and of evidence as to the volume of business transacted in these places.

XX.

Because the Court should have excluded from the consideration of the jury all evidence as to Ruppe's estimate of the expenses of the business carried on by plaintiffs, and the percentage of the gross profits derived therefrom.

XXI.

Because the rulings of the Court on the admission and rejection of evidence were inconsistent with each other and were highly prejudicial to the defendants.

XXII.

884 Because the Court erred in giving to the jury Paragraph No. 1 of the charge of the Court. Because the same does not correctly state the issues in the case, but ignores the defense that the wall of the plaintiffs' building fell because of inherent defects in its construction, etc.

XXIII.

Because the Court erred in Paragraph Six of its charge to the jury.

XXIV.

Because the Court erred in Paragraph No. 8 of its charge to the jury.

XXV.

Because the Court erred in Paragraph No. 13 in its charge to the jury.

XXVI.

Because the Court erred in Paragraph No. 14 of its charge to the jury.

XXVII.

Because the Court erred in Paragraph No. 15 of its charge to the jury.

XXVIII.

Because the Court erred in Paragraph No. 17 of its charge to the jury.

XXIX.

Because the Court erred in Paragraph No. 18 of its charge to the jury.

XXX.

Because the Court erred in Paragraph No. 20 of its charge to the jury.

XXXI.

Because the Court erred in Paragraph No. 27 of its charge to the jury.

XXXII.

Because the Court refused to give to the jury Instruction
885 No. 1 asked by the defendant Weinman.

XXXIII.

Because the Court refused to give to the jury Instruction No. 2 asked by the defendant Weinman.

XXXIV.

Because the Court refused to give to the jury Instruction No. 3 asked by the defendant Weinman and failed to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

XXXV.

Because the Court refused to give to the jury Instruction No. 4 asked by the defendant Weinman and failed to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

XXXVI.

Because the Court refused to give to the jury Instruction No. 5 asked by the defendant Weinman and failed to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

XXXVII.

Because the Court refused to give to the jury Instruction No. 6 asked by the defendant Weinman and failed to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

XXXVIII.

Because the Court refused to give to the jury Instruction No. 7 asked by the defendant Weinman and failed to endorse
886 his refusal thereon and sign the same as required by the statute in such cases made and provided.

XXXIX.

Because the Court refused to give to the jury Instruction No. 9 asked by the defendant Weinman and failed to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

XL.

Because the Court refused to give to the jury Instruction No. 10 asked by the defendant Weinman and failed to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

XLI.

Because the Court refused to give to the jury Instruction No. 11 asked by the defendant Weinman and failed to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

XLII.

Because the Court refused to give to the jury Instruction No. 12 asked by the defendant Weinman and failed to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

XLIII.

Because the Court refused to give to the jury Instruction No. 13 asked by the defendant Weinman and failed to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

887

XLIV.

Because the Court refused to give to the jury Instruction No. 14 asked by the defendant Weinman and failed to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

XLV.

Because the Court refused to give to the jury Instruction No. 15 asked by the defendant Weinman and failed to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

XLVI.

Because the Court refused to give to the jury Instruction No. 16 asked by the defendant Weinman and failed to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

XLVII.

Because the Court refused to give to the jury Instruction No. 17 asked by the defendant Weinman and failed to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

XLVIII.

Because the Court refused to give to the jury Instruction No. 18 asked by the defendant Weinman and failed to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

XLIX.

888 Because the Court refused to give to the jury Instruction No. 19 asked by the defendant Weinman and failed to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

L.

Because the Court refused to give to the jury Instruction No. 20 asked by the defendant Weinman.

LI.

Because the Court refused to give to the jury Instruction No. 21 asked by the defendant Weinman.

LII.

Because the court refused to instruct the jury as requested by the defendant Barnett.

LIII.

Because the court, after the jury had returned into court a complete verdict, refused to accept the same and gave to the jury the following instructions:

If by the verdict you have brought in assessing the plaintiffs' damages against the defendant at five thousand dollars with six per cent interest, you mean that something in the nature of interest up to the present time be added to the sum of five thousand dollars you name, you should yourselves determine the amount, under the instructions given you, and it will be the better way to add to whatever other sum you may find, so as to make one total. The court has no right to make the computation or determination for you. If it is not your intention to add anything in the nature of interest up to the present time to said sum of five thousand
889 dollars, you should make your meaning clear by your verdict.

LIV.

Because for divers other reasons occurring at the said trial whereby the said defendant was prevented from having a fair and impartial trial in said cause.

And thereafter and on the 16th day of June, 1910, the said motions for new trial were severally overruled and judgment was rendered on the verdict in favor of the plaintiffs, to which action of the court the said defendants then and there severally excepted and still except.

The defendants ask the court to order Exhibits I, L, M, N-1 to N-5 inclusive, O-1, and O-2, offered and admitted in evidence, to be sent up by the clerk of this court to the Supreme Court for inspection upon the hearing of the appeal in this case; but the court refuses to order the same to be sent up, for the reason that in the opinion of the trial Judge, a statement of their substance, with so much of their contents as should be necessary to properly present any point at issue, could be agreed upon and settled by the Judge, and could be included in the record in place of the exhibits as omitted, and for that reason and because the exhibits in question would needlessly encumber the record and would impose on the Supreme Court the examination and consideration of facts refuses to make such order to which action of the Court the defendants excepted and still except.

IRA A. ABBOTT, *Judge.*

890 It is impracticable to incorporate in this bill of exceptions exhibits I, L, M, N-1 to N-5 inclusive, O-1 and O2, offered and admitted in evidence as shown by this bill of exceptions, and the defendants therefore asked the court to order the same to be sent up by the clerk of this court to the Supreme Court for inspec-

tion upon the hearing of the appeal in this case, but the court refused to order the same to be sent up for the reason that in the opinion of the trial judge the appearance and contents of said exhibits was for the consideration of the jury alone and an inspection of the same by the Supreme Court is improper and unnecessary and for that reason alone refused to make such order, to which action of the court the defendants excepted and still except.

The request of the defendants to have this included in the bill of exceptions is refused.

IRA A. ABBOTT,
Judge 2nd Dist.

Nov. 9, 1910.

And forasmuch as the matters and things herein set out are not of record in the said cause, the said defendants pray that this their bill of exceptions, containing all of the evidence, offered, admitted and rejected, with the rulings of the court thereon, and the exceptions of the defendants thereto taken at the time, together with all of the insructions asked, given and refused, and the charge of the court to the jury and the exceptions of the defendants thereto, and all of the proceedings of the said trial with the rulings of the
891 court thereon, with a reference to those documents and things of evidence which it is impracticable to copy into this bill of exceptions, but which are made part hereof by reference thereto, and are ordered to be transmitted to the clerk of the supreme court of the Territory of New Mexico for the purpose of consideration by that court as a part of this bill of exceptions, may be signed, sealed and enrolled by the judge of this court, and made a part of the record and proceedings herein, which is done this 9 day of November, 1910.

IRA A. ABBOTT, *Judge.*

Which said bill of exceptions is endorsed: "Filed in my office this Nov. 9, 1910. Thos. K. D. Maddison, Clerk."

TERRITORY OF NEW MEXICO,
County of Bernalillo, ss:

I, Thos. K. D. Maddison, Clerk of the District Court of the Second Judicial District of the Territory of New Mexico, within and for the County of Bernalillo, in obedience to an order granting an appeal hereinbefore set forth, do hereby certify unto the Supreme Court of the Territory of New Mexico, the above and foregoing as a true, correct and complete transcript and copy of so much of the record and proceedings had in the cause lately pending in said Court for the County of Bernalillo, wherein Richard Di Palma and Bernard Ruppe, were plaintiffs, and Jacob Weinman and Joseph Barnett, defendants, as the same appears on file and of rec-
892 ord in my said office, and as I was by a præcipe of record filed herein requested to make.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court this tenth day of November, A. D. 1910.

[SEAL.] THOS. K. D. MADDISON,
Clerk of the District Court.

893 And afterwards, on towit, on the 29th day of December *twenty-ninth*, A. D., 1910, there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico, an assignment of errors which said assignment of errors was and is in the following words and figures *following* towit:—

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1911.

No. 1359.

RICHARD DIPALMA and BERNARD RUPPE, Appellees,
vs.
J. A. WEINMAN and JOSEPH BARNETT, Appellants.

Appeal from District Court, Bernalillo County.

Assignment of Errors.

Comes now the appellant, Joseph Barnett, by Neill B. Field, his attorney, and shows to the Court here that in the record, proceedings and judgment of the District Court of Bernalillo County, in the above entitled cause, there is manifest error in this, to-wit:

I.

The court erred in permitting the witness La Driere to be examined with reference to having drawn plans for a building to cover both lots one and two prior to the falling of the wall in question in this case—found on pages 254, 255, 256 and 257 of the printed transcript.

II.

The court erred in admitting in evidence the specifications offered by appellees (Trans. 264 to 270).

III.

The court erred in admitting in evidence the party wall agreement (Trans. 271).

894 IV.

The court erred in admitting in evidence the contract, "Exhibit K." (Trans. 275).

V.

The court erred in admitting in evidence "Exhibit H," foundation plans, Record 263.

VI.

The court erred in permitting the appellees to give evidence as to their efforts to find a new location (Trans. 300, 301-2-3).

VII.

The court erred in overruling the objection of appellees to the following question:

Q. From your experience as a merchant in Albuquerque, as you have given it, do you know how the building—how the store in the Grant building to which you moved, compared as a business location for a drug store with the store—with the building that fell, that you had formerly occupied? (Trans. 304.)

VIII.

The court erred in permitting the witness Ruppe to give the comparison of locations found on page 305 of the transcript.

IX.

The court erred in overruling the objection to the question:

Q. What did you say as to whether or not the list as you
895 made it up was correct so far as it went, of the articles that had been destroyed? (Trans. 307.)

X.

The court erred in overruling the objection to the following question:

Q. Now, did you make from that book a copy of the memorandum of the goods lost, which was contained in it? (Trans. 309.)

XI.

The court erred in permitting counsel for appellees persistently to lead the witness Ruppe.

XII.

The court erred in permitting the witness Ruppe to refresh his recollection from the bill of particulars (Trans. 311).

XIII.

The court erred in overruling the objection to the question:

Q. Will you please refer to the bill of particulars that you have mentioned and refresh your recollection and tell us what articles were destroyed, and their value? (Trans. 312.)

XIV.

The court erred in permitting the appellees to give evidence of the expense of removing from the Weinman building to the Grant Building (Trans. 320-21).

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XV.

The court erred in permitting the appellees to give evidence that the value of the goods damaged immediately before the fall of the wall was $800.00. (Trans. 332.)

XVI.

The court erred in permitting the appellees to give evidence that the value of the goods damaged immediately after the fall of the wall and after they were separated was $300.00 (Trans. 333).

XVII.

The court erred in permitting appellees to give evidence as to the daily cash receipts of their business. (Trans. 334 to 338).

XVIII.

The court erred in overruling the objection:

"And on behalf of Mr. Barnett I object that: all of it is testimony for the purpose of laying foundation for secondary evidence, and is not competent to go to the jury in any case, and tends to mislead the jury as to what they are called upon to try, and because the question of what may have been done or left undone at any former trial of this case, does not change the rules of evidence." (Trans. 348).

XIX.

Th court erred in overruling the objection:

897 "I wish to make an objection also, if the court please, on behalf of defendant Barnett, to the introduction of parts of this book now offered, because when it is attempted to prove loss of profits in such a case as this, it is necessary that the parties relying on such evidence shall present at least such a complete set of accounts as will enable a bookkeeper to ascertain the amount of capital employed in the business, the expense of conducting it, its income and profits, from the books themselves, and that it is incompetent to offer anything less than a complete system of accounts of such character as is indicated; and such accounts, when offered, as the basis of proof of loss of profits, cannot be supplemented by oral testimony of estimates of profits; the books and accounts offered in evidence must be reasonably complete in themselves and must appear to have been a reasonably complete set of accounts and not a mutilated set or part of a set, or less than such a set of accounts as is indicated by the objection." (Trans. 350-51.)

XX.

The court erred in overruling the objection:

"I object, for the reason that evidence of this character is incompetent for any purpose unless accompanied by similar evidence as to disbursements and such a set of accounts as will enable a bookkeeper

to take the accounts and verify the results of the witness's testimony. In other words that it is incompetent to present a part of the set of books and from that to attempt to show receipts without showing also the disbursements in the same way by similar evidence,
898 so that the question of loss of profits, if any, can be verified." (Trans. 352.)

XXI.

The court erred in overruling the objection to the question:

Q. Now, Mr. Ruppe, can you tell us whether or not in your business as a druggist you had any system of selling prices from which you can determine the amount of your receipts from the sale of goods over their cost price to you? (Trans. 354.)

XXII.

The court erred in refusing to strike out the answer:

A. A good many of the medicines came with the price marked thereon; others we figured the cost, and what they are worth at retail is marked thereon, prescriptions are compounded and the profit is figured on the drugs and the time used in preparing the same. Certain goods such as sundries and articles of luxury are generally figured at a percentage ranging from fifty to one hundred per cent; prescription compounding must bring more than one hundred per cent, patent medicine profits range all the way from 25 to 35 per cent; in my experience as a druggist, in figuring the profits that I have made in my business I figure that my business produced me an average of forty per cent gross. (Trans. 355).

899 XXIII.

The court erred in refusing to strike out the answer:

A. My knowledge of the business permits me to state that I make 40 per cent on my sales. (Trans. 356.)

XXIV.

The court erred in overruling the objection:

"I object to that because it is not competent in such an inquiry as this, to show receipts by books and expenditures by oral testimony but in order to lay a foundation for recovery of loss of profits, there must be such a system of accounts presented as will enable a bookkeeper to take those accounts and, with reasonable certainty, determine the extent of the profits." (Trans. 358.)

XXV.

The court erred in overruling the objection to the question:

Q. State, if you can then, Mr. Ruppe, what you- monthly expenses were in the operation of that business during the time that you were in the Weinman building. (Trans. 359.)

XXVI.

The court erred in overruling the motion to strike out the answer:

A. One-half in December, 1901—$217; January, $434; February, $434; March, $434; April, $434; May, $434; June, 434; making a total expense of $2,821. (Trans. 360.)

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XXVII.

The court erred in overruling the objection to the question:

Q. Now, can you give us the average daily cash receipts by the month for the period of time in question? (Trans. 360.)

XXVIII.

The court erred in overruling the objection to the question:

Q. Do you know what your average daily sales were during that period? (Trans. 363.)

XXIX.

The court erred in overruling the objection to the question:

Q. Did you keep in your books a record each day of the total daily sales? (Trans. 365.)

XXX.

The court erred in overruling the objection to the question:

Q. How, then, can you tell us the daily sales or the average daily sales? (Trans. 365.)

XXXI.

The court erred in overruling the motion to strike out the answer:

A. By figuring at the end of the month the outstanding
901 accounts due me, and that showed me that my business between cash and credit was the same on the average. (Trans. 366.)

XXXII.

The court erred in overruling the objection to the question:

Q. Do you know what the ordinary rates of interest on money was here in Albuquerque during that time? (Trans. 367).

XXXIII.

The court erred in overruling the objection:

"We make the objection that we did not invite him to go into business at any other place; that what he did in any other place is wholly immaterial, irrelevant and incompetent." (Trans. 370.)

XXXIV.

The court erred in overruling the objection to the question:

Q. Now, where was that location with reference to the business center of the city, as you have already described it? (Trans. 371.)

XXXV.

The court erred in overruling the objection to the question:

Q. Tell us, what, if any, efforts you made after removing to the Grant building, to find a more favorable location? (Trans. 371.)

902 XXXVI.

The court erred in overruling the motion to strike out the answer:

A. I tried to rent the Barnett corner, or the one at present occupied by Mr. Matson. I saw Mr. Lewinson, of the Economist, and tried to rent half of his store. (Trans. 372.)

XXXVII.

The court erred in overruling the objection to the question:

Q. Were you able to find, at or prior to the time that you removed into the Armijo building, any location nearer to the business center than you have described, as you have described it—than the Armijo building? (Trans. 373.)

XXXVIII.

The court erred in overruling the objection to the question:

Q. Do you know, from your experience as a business man in Albuquerque, as you have testified to it, how the stand in the N. T. Armijo building, to which you removed, compared as a business location for the drug business, with the stand in the Grant building? (Trans. 373.)

XXXIX.

The court erred in overruling the objection to the question:

Q. And how did the location in the Armijo building com-
903 pare with the location in the Weinman building? (Trans. 374.)

XL.

The court erred in overruling the motion to strike out the answer:

A. The location I occupy at present is inferior to the one I formerly occupied in the Weinman building. (Trans. 374.)

XLI.

The court erred in admitting in evidence receipts in the Armijo building. (Trans. 375-6.)

XLII.

The court erred in overruling the objection to the question:

Q. Mr. Ruppe, can you tell us how much capital you had invested in your business while you were in the Grant building, in the Armijo building, during the period which you have just testified? (Trans. 376.)

XLIII.

The court erred in overruling the objection to the question:

Q. Do you know what was the rate of interest ordinarily received on moneys during that period: do you know what the ordinary rate of interest was which money was earning in Albuquerque during that period while you were in the Grant building and the Armijo building? (Trans. 377.)

904 XLIV.

The court erred in overruling the objection:

"And further, it affirmatively appears from the testimony of the witness that no system of accounts was kept whereby the capital invested in the business, the receipts or expenditures or profits could be reasonably ascertained." (Trans. 384-5).

XLV.

The court erred in admitting in evidence five books. (Trans. 385.)

XLVI.

The court erred in overruling the objection:

"We make now, the general objection that the book as presented is in a mutilated condition, pages 213 and 214 being obviously cut out, and others, which I will specify when my attention is called to the numbers—otherwise, I will ask an opportunity to look through it now.

Mr. WOOD: 181-2-3-4 were also cut out.

Mr. FIELD: And the further objection that pages 181 to 184, inclusive, have been taken out, and that the book, upon its face, is mutilated by erasures and the marking out of lines, and is otherwise unintelligible; and that all the books offered by the plaintiffs do not comprise a whole system of accounts, as testified to by him; that he had a pass book and check book which were part of this system and which he intentionally destroyed after the rights of the parties to this action became fixed." (Trans. 387.)

905 XLVII.

The court erred in overruling the motion to strike out the answer:

A. I immediately telephoned to Trinidad, Colorado, and after two days succeeded in locating Father Di Palma, requested him to send them at once, and immediately put them into the safe in Mr. Wood's office. (Trans. 400.)

XLVIII.

The court erred in overruling the motion to strike out the answer:

A. To show him what cash and medicines were charged to his account. (Trans. 401.)

XLIX.

The court erred in overruling the objection to the question:
Q. Well, Mr. Ruppe, have you examined this book which you have offered in evidence, for the purpose of determining what, if any, bad debts were incurred by you because of merchandise sold during the period of the Weinman lease? (Trans. 417.)

L.

The court erred in overruling the objection:
"I wish to make objection on behalf of Defendant Barnett: I join in the objection of the Defendant Weinman and make the further objection that evidence as to the amount of bad debts incurred, without evidence as to the amount of purchases or sales of
906 merchandise, is incompetent and merely tends to mislead the jury, and sheds no light upon the issues in this cause."
(Trans. 418.)

LI.

The court erred in overruling the objection to the question:
Q. Mr. Ruppe, from your experience as a merchant during the time in question, do you know what the conditions of trade in Albuquerque were for a year and a half subsequent to the fall of the wall? (Trans. 421.)

LII.

The court erred in overruling the objection to the question:
Q. How did it compare with the conditions of trade as they existed in Albuquerque during the time you were in the Weinman building? (Trans. 422.)

LIII.

The court erred in overruling the motion to strike out the answer:
A. Conditions were getting better. (Trans. 423.)

LIV.

The court erred in overruling the motion to strike out the answer:
A. I have not produced them because I was not required to do so.
(Trans. 472.)

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LV.

The court erred in overruling the motion to strike out the answer:
A. My answer to that undoubtedly indicates that I referred to the list as made out here by me. (Trans. 480.)

LVI.

The court erred in overruling the motion to strike out the answer:
A. Because undoubtedly, the same as I said before, I must have

had on my mind in answering that question that list I prepared. (Trans. 481.)

LVII.

The court erred in sustaining the objection to the question:

Q. Didn't he tell you that they were going to dig under your wall and put a footing in there and put up a straight brick wall which would straighten the wall in your store? (Trans. 501.)

LVIII.

The court erred in sustaining the objection to the question:

Q. What, if anything, did you do toward preparing for the possible weakening of that wall, during the process of that excavation? (Trans. 509.)

LIX.

The court erred in overruling the motion to strike out the testimony as follows:

908 "The defendant Weinman moves to strike out all the testimony of this witness with reference to the value of the electric piano, for the reason that the witness has shown that all he knows is what he paid for it, which is not the true measure of value; and also moves to strike out the testimony of the witness with reference to the back shelving because it is shown to be based upon hearsay and not upon any knowledge of the witness." (Trans. 536.)

LX.

The court erred in overruling the motion of the appellant Barnett:

"On behalf of the Defendant, Barnett, I desire to move to strike out certain portions of the testimony: In the first place I desire to move to strike out all of the books of account offered in evidence on behalf of the plaintiffs in this case for the reason that it affirmatively appears that these books of account are not in themselves—do not constitute in themselves a complete system of accounts from which a bookkeeper could ascertain the amount of capital embarked in this business, or the amount of business actually conducted or the profits thereof; that it is impossible to ascertain from these books of account the merchandise purchased and the amount of expense incurred in the conduct of the business, and also that no foundation has been laid for the introduction of them as books of account under the requirements of the statute of this territory in such cases; that

909 by the laws of the Territory of New Mexico, Section 2650 of the Compiled Laws of 1897, and that chapter generally, a partnership is required to keep their books in due form and inventory their stock and actually keep account of all the business that they transact; that these books do not conform to that requirement; further, that it affirmatively appears that at and before the institution of this suit, and afterwards, plaintiffs had in their possession other evidence of a documentary character, which, taken in connection with the books of account produced here, would have

enabled a bookkeeper—or a person familiar with accounts—to ascertain the extent of the business transacted by the plaintiffs, the amount of the profits and the expenses—all the other necessary data, and it affirmatively appears that that documentary evidence was intentionally destroyed by one of the plaintiffs, Bernard Ruppe, or under his direction." (Trans. 552-3.)

LXI.

The court erred in overruling the motion of the appellant Barnett: "I further move to strike out all of the evidence of the witness, Bernard Ruppe, with reference to the value of the goods that were damaged and the extent of damage to those goods, for the reason that there is no legal evidence which would authorize the court to submit to the jury the question of such damages, and for the further reason that no such damages are claimed in complaint, and no such item is contained in the bill of particulars made under the order of the court." (Trans. 553.)

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LXII.

The court erred in overruling the motion of the appellant Barnett. "I further move the court to strike out all of the testimony of the witness, Ruppe, which was given after refreshing his recollection by the use of the bill of particulars while he was on the witness stand, for the reason that no proper foundation was laid for permission to the witness to use the bill of particulars for the purpose of refreshing his recollection; and it affirmatively appears that that bill of particulars was a copy of another list which was contained in a book which was lost; that the loss of that book was not sufficiently established, and for the further reason that if the book were here it was not such a memorandum as under settled rules of evidence the witness, Ruppe, would be permitted to refer to for the purpose of refreshing his recollection; it affirmatively appearing that it was not made at or near to the time of the transaction with which it purports to deal; was not made on Ruppe's personal knowledge, but was made up over a period of months of time in which he listed in that book such articles of merchandise as he missed out of his stock, for months after the fall of the wall, and upon consultation with Baltes and Mallette, his clerks; and that he put on that list such articles of merchandise as were not found in his stock from time to time, whenever he did not remember that they had been sold—whenever Baltes did not remember that they had been sold, or whenever Mallette did not remember that they had been sold, or
911 whenever all or any one of these remembered that they had had those things in stock before the removal from the building which fell down; and it further affirmatively appears that this was not a writing which was shown by the witness to be correct at the time it was made, or one which he would be authorized under the law to inspect for the purpose of refreshing his memory; neither was the writing, or a copy of it, legal evidence of any fact therein contained." (Trans. 553-4-5.)

LXIII.

The court erred in overruling the motion of the appellant Barnett.

"I move to strike out all of the testimony of the witness, Ruppe, with reference to the character of the business section of the town of Albuquerque and the relative—I do not remember just what the term was—availability, I will say that—the witness did not say that—availability of its purpose—of the various places to which he moved after the fall of the wall, and his opinion as to how much better a place of business the one which he rented from Weinman was to the other places to which he moved—the relative availability of the *the* business location, because no proper foundation was laid for such evidence, and in the second place there is no evidence that the defendants, or either of them, notified Mr. Ruppe to engage in business at any other place, except the Weinman place, and testimony as to these points, to which, by this particular objec-
912 tion attention is called, tends to mislead the jury and introduced a false issue in the case." (Trans. 555.)

LXIV.

The court erred in overruling the motion of the appellant Barnett.

"I move to strike out all of the testimony of the witness, Ruppe, with reference to the loss of profits, as well as all the testimony as to the amount of cash sales and his estimate of expenses, and of all testimony of that character, because in the first place no proper foundation was laid for it, and in the second place it was largely opinion evidence, and in the third place the evidence is wholly insufficient taken as a whole, together with all the other evidence in the case, to authorize the court to submit to the jury the question of loss of profits." (Trans. 555-6.)

LXV.

The court erred in sustaining the objection to the question:

Q. Well, was this testimony, as you give it then, true according vation at the northeast corner of the wall? (Trans. 582.)

LXVI.

The court erred in overruling the objection to the question:

Q. Well, was this testimony, as you gave it then, true according to your recollection as it was then? (Trans. 585.)

913 LXVII.

The court erred in sustaining the objection to the question:

Q. Now, I want to ask you again: if you did not tell me in my office last Saturday afternoon that at the time this foundation was uncovered you were working at the brewery, and Ed Steiner was in charge of the work. (Trans. 598.)

LXVIII.

The court erred in sustaining the objection to the question:

Q. Now, state Mr. La Driere, whether or not that wall was ever built, or that foundation plan that you have testified to, was ever carried out? (Trans. 603.)

LXIX.

The court erred in sustaining the objection to the question:

Q. Now testifying from your experience as an architect, and your knowledge of the conditions that existed, state whether or not that party wall might have been built according to the plans and specifications, with safety to the Ruppe wall, had it been a solid wall, firm, straight and in line? (Trans. 607.)

LXX.

The court erred in overruling the objection to the question:

Q. If you did so testify was that testimony true? (Trans. 666.)

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LXXI.

The court erred in overruling the objection to the question:

Q. Well, is your recollection better or poorer now as to those facts, than it was when you testified upon that trial in 1906? (Trans. 714.)

LXXII.

The court erred in permitting appellees to read in evidence the release from Weinman to Barnett. (Trans. 747-8.)

LXXIII.

The court erred in overruling the objection to the question:

Q. Would your answer have been the same had there been two successive excavations under the front end of the wall, each of them approximately five feet in length and extending substantially, or quite, under the wall, with a pier of dirt between, four or five feet in length? (Trans. 758.)

LXXIV.

The court erred in overruling the motions to strike out the evidence renewed. (Trans. 820-1-2-3.)

LXXV.

The court erred in giving to the jury Paragraph One of the charge. (Trans. 825.)

LXXVI.

The court erred in giving to the jury Paragraph Six of the charge:

915 "You are further instructed that if you believe from the evidence that one of the plaintiffs, B. Ruppe, stood by, knowing the kind of wall that was to be erected, where it was to be placed,

and the manner in which the same was to be erected and acquiesced in the erection of the same, and by his conduct, led the defendants to believe that he acquiesced and consented to the erection of the same, as it was to be erected, then the plaintiffs are estopped from recovering in this action for damages occasioned by doing anything to which they so consented. But if the plaintiff, Ruppe, was misled by representations made by or in behalf of the defendants, or either of them, as to the safety of what it was proposed to do, and was not so well qualified to judge as to their truth, as were those who made them, and for that reason acquiesced, then the plaintiffs are not estopped by such acquiescence." (Trans. 829.)

LXXVII.

The court erred in giving to the jury Paragraph Eight of the charge:

You are further instructed that unless you believe from a preponderance of the evidence that the wall of the building occupied by the plaintiffs fell by reason of excavation made upon lot number 2 in block 16, that such excavation so made upon lot number 2 and block 16 was the proximate cause of the fall of the said wall, you should find the issues for the defendants; otherwise you should find the issues for the plaintiffs. (Trans. 830.)

916 LXXVIII.

The court erred in giving to the jury Paragraph Thirteen of the charge:

You are further instructed that the defendant Weinman had no lawful right, without the consent of the plaintiffs, to go upon lot 2 if it was occupied by the plaintiffs as his tenant under the lease in evidence, and to erect a wall on the line between said lot- 1 and 2, a part on each lot, or to tear down the wall or any portion thereof, of the building so occupied by the plaintiffs, and that he could not give the defendant Barnett any lawful right to do that which he, the defendant Weinman, had not the right to do. (Trans. 832.)

LXXIX.

The court erred in giving to the jury Paragraph Fourteen of the charge:

You are instructed that any actual expulsion of the tenants by the landlord or by any person acting by his authority, or anything so done which so seriously disturbs the tenant's possession as to compel an abandonment of the premises by them, or which deprives him of their beneficial enjoyment, amounts to an eviction and the rent is suspended from the time of such expulsion or disturbance. (Trans. 833.)

LXXX.

The court erred in giving to the jury Paragraph Fifteen of the charge:

You are further instructed that if you find from a preponderance of evidence that the defendant Barnett, in pursuance of the contract between himself and the defendant Weinman and without the consent of the plaintiffs, caused excavations to be made on said lot 2, or any portion thereof, either by his agents or servants, or by any independent contractor, then both these defendants, Weinman and Barnett, were equally guilty of trespass, and it is immaterial that the parties doing the work were also trespassers because the plaintiffs had the right to sue any one *one* or more of those guilty of trespass. (Trans. 833-4.)

LXXXI.

The court erred in giving to the jury Paragraph Seventeen of the charge:

If you find from a preponderence of the evidence that said defendants committed the acts complained of by said plaintiffs, and you further find that the plaintiffs were damaged thereby, then you will find from the evidence the amount which was the natural and proximate consequence of the said wrongful act of the defendant, and your verdict should be in such amount as will compensate the plaintiffs for the damage suffered. (Trans. 834-5.)

LXXXII.

The court erred in giving to the jury Paragraph Eighteen of the charge:

You are further instructed that in arriving at said amount you may take into consideration the testimony regarding the loss of profits occasioned by the removal to another location, the testimony regarding the value of the stock of merchandise and fixtures destroyed, if any were destroyed, and the testimony regarding the injury and damage, if any, to the remaining stock and fixtures, the testimony regarding reasonable expenses in removing to another location, and the repair of the fixtures and furniture partially destroyed, and the testimony regarding such other items to which it relates, as are the proximate consequences of the acts of the defendants, if you believe from a preponderance of the evidence that the acts of the defendants complained of were the proximate cause of any loss or damage to the plaintiffs. (Trans. 835.)

LXXXIII.

The court erred in giving to the jury Paragraph Nineteen of the charge:

You are instructed that an established business is capable of injury or destruction, as a house or other material object is, but in the nature of the case it is much more difficult to determine the value of a business destroyed or the amount of damages to it if injured than it is to determine the value of a house or the injury to it. To illustrate, a man may have an established business of growing vegetables for the market and may have customers in his neighborhood

who are in the habit of buying of him; he may have a lease of a parcel of land on which he grows the vegetables on which crops will not grow without irrigation. The land may be irrigated from a stream which is the only source from which it could be irrigated. That stream might be diverted at its source by the work of man or by some convulsion of nature, so that it would be no longer
919 possible to irrigate the land. In that way his business might be wholly destroyed. If he could get other land, not too far from his customers on which he could grow vegetables his business might not be destroyed or even injured. It might cost him something to make the necessary changes, but that would not be injury to his business as such. Injury to the business would consist in loss of trade or greater expense in supplying his customers, or both. To show what the injury to the business was, evidence in relation to the profits before and after the change would be admissible, but would not be alone and in itself conclusive.

If under instructions given you and on the evidence you have heard, you determine that the plaintiffs are entitled to recover damages from the defendants, you should then determine from the evidence the value of the personal property of the plaintiffs, if any, which was wholly destroyed, and in doing that take its market value in Albuquerque at the time, not at retail in the business of the plaintiffs, but the cost to them as apothecaries, to replace the goods destroyed in their stock in Albuquerque, and in determining the damage to plaintiffs, if you find there was any from injury to goods which were not wholly destroyed or lost, you should take the difference, if you can determine it from the evidence, between the market val-e before the injury of such goods in Albuquerque, as already explained to you and their value determined in the same way after they were injured. (Trans, 836-7.)

920 LXXXIV.

The court erred in giving to the jury Paragraph Twenty of the charge:

You are instructed that if you find the plaintiffs are entitled to any damages, you may take into consideration, if you think fit, the length of time which has elapsed since the damage occurred, and, if you think fit, give damages in the nature of interest over and above the property damages actually suffered by the plaintiffs. (Trans. 837-8.)

LXXXV.

The court erred in giving to the jury Paragraph Twenty-seven of the charge:

You will have with you two forms for a verdict, by one of which you will find for the defendants, and, by the other, for the plaintiffs. In the latter will be a space for the amount of damages you may assess. (Trans. 840.)

LXXXVI.

The court erred in refusing to instruct the jury to find the issues for Barnett:

The defendant Barnett asks the court to instruct the jury to find the issues for the defendants. (Trans. 841.)

LXXXVII.

The court erred in refusing to instruct the jury as follows:

The court instructs the jury that if they believe from the evidence that the wall of the building occupied by the plaintiffs fell
921 because of any inherent defects in the wall itself, or because of a caving of lot number two, in block sixteen, they should find the issues for the defendants, notwithstanding they may believe from the evidence that such caving of lot number two, in block sixteen, was occasioned by excavations made on lot number one, in block sixteen, which excavations deprived lot number two of the lateral support heretofore furnished to it by lot number one prior to the excavation. (Trans. 841-2.)

LXXXVII.

The court erred in refusing to instruct the jury as follows:

The court instructs the jury that before the plaintiffs can recover in this action, they must satisfy the jury by a preponderance of the evidence that some of the injuries alleged in the complaint were occasioned by some wrongful act committed by the defendants, and it is not sufficient that the plaintiffs shall by evidence make it appear that some act of the defendants might have caused such injury, but on the contrary, the jury must be satisfied by a preponderance of the evidence that some act of the defendant did cause such injury or the plaintiffs cannot recover. (Trans. 842.)

LXXXIX.

The court erred in refusing to instruct the jury as follows:

The court instructs the jury that there is no presumption that the wall of the building in question fell because of anything done
922 by the defendants, or either of them and before the plaintiffs can recover in this case they must satisfy the jury by a preponderance of the evidence that the injuries alleged in the complaint were in fact occasioned by some wrongful act committed by the defendants, and not merely that they might have been so occasioned. (Trans. 842-3.)

XC.

The court erred in refusing to instruct the jury as follows:

The court instructs the jury that the owner of a building lot in Albuquerque, such as the lots referred to in the evidence in this case, owes no duty to the owner of an adjoining lot to furnish support for any building or structure which may be erected or standing on such adjoining lot, but it is the duty of every such owner to see to it, at his peril, that the foundations and walls of his structure are of a strength and stability sufficient to sustain themselves without lateral assistance from adjoining property. (Trans. 843.)

473

XCI.

The court erred in refusing to instruct the jury as follows:

The court instructs the jury that the defendant Barnett was not a party or privy to any contract between the plaintiffs and the defendant Weinman in relation to the building and structure mentioned and described in the lease in evidence; that this is not a suit for the recovery of damages growing out of the breach of any con-
923 tract rights of the plaintiffs, but is a suit for wrongs alleged to have been done by the defendants to the plaintiffs.

XCII.

The court erred in refusing to instruct the jury as follows:

The court instructs the jury that if they believe from the evidence that the defendant Barnett employed a competent architect to prepare plans and specifications for the construction of a building on lot number one, in block sixteen, of the original townsite of Albuquerque, and if the jury further believe from the evidence that the said defendant Barnett employed a competent person to erect a building and make excavations in accordance with the said plans and specifications, and if the jury further believe from the evidence that it was practicable to so erect and construct the said building in accordance to the said plans and specifications without injury to the plaintiffs in this case, then the plaintiffs cannot recover from the defendants, even though the contractor employed by the said defendant Barnett, in the execution of his contract, committed some act which amounted to a trespass upon the rights of the plaintiffs, but the remedy of the plaintiffs, if any, for such trespass, is against the contractor and not against the defendants in this case. (Trans. 844.)

XCIII.

The court erred in refusing to instruct the jury as follows:

924 The court instructs the jury that they are not bound to accept as true the testimony of the plaintiff, B. Ruppe, as to the quantity or value of the property lost or destroyed or injured by reason of the fall of the wall of said building, as testified to by the witnesses, but it is the duty of the jury to determine the amount and extent of the loss of the plaintiffs, if any, from all of the evidence in the case and from their general knowledge of human affairs, and if the jury believe from the evidence that the plaintiff B. Ruppe has suppressed any fact in connection with the value or quantity of goods lost, or has attempted to exaggerate in any manner the extent of his loss, they have the right to take such fact into consideration in determining the extent of the plaintiff's damages. In no event can the plaintiffs recover in this case a sum in excess of the actual damages suffered and sustained by them, which damage must be directly attributable to some wrongful act on the part of the defendants, and before the plaintiffs can recover any damages against the defendants they must satisfy the jury by a preponderance of the evidence that such damages were occasioned by some wrong on the

part of the defendants. It is not sufficient that they shall show that some wrongful act on the part of the defendants might have occasioned the damages. (Trans. 845.)

XCIX.

The court erred in refusing to instruct the jury as follows:

The court instructs the jury that in assessing the plaintiffs' damages they can allow nothing for the injury to goods by
925 reason of their being rendered unsalable, as testified to by the witness Ruppe, because there is no legal evidence of such damages, and the statement by said witness that such damage amounted to the sum of five hundred dollars is insufficient in law to warrant a finding by the jury that any such damage was so suffered. (Trans. 846.)

XCV.

The court erred in refusing to instruct the jury as follows:

The court instructs the jury that if they believe from the evidence that the plaintiffs, or either of them, with full knowledge of the terms of the party wall agreement, encouraged the defendants to proceed with the execution of the said agreement, and did not object to the excavation being made on lot number two, in pursuance of the said agreement, then and in that case the plaintiffs are estopped to claim that such excavation on lot number two by the defendants, if made, was a trespass upon their rights as tenants of the said lot. (Trans. 846.)

XCVI.

The court erred in refusing to instruct the jury as follows:

The court further instructs the jury that the plaintiffs claim damages from the defendants for injury to and destruction of personal property, and for an injury to their estate in lot number two, in block sixteen, of the original townsite of Albuquerque, described in the complaint, that the estate of the plaintiffs in the said
926 lot number two, in block sixteen, was an estate for years subject to be terminated by default in payment of the rent reserved by the terms of said lease; that it is admitted by the pleadings that the plaintiffs failed to pay an installment of the rent reserved at the time when the same became due, and the defendant Weinman by reason of such default in the payment of said rent became entitled to re-enter and take possession of the said premises; that the plaintiffs can recover from the defendants, if at all, no damages to their interest in the said real estate which accrued subsequent to the termination of their estate therein as defined in this instruction. (Trans. 847.)

XCVII.

The court erred in refusing to instruct the jury as follows:

The court instructs the jury that while the owner of the fee in

real estate is entitled to dominion over the same from the dome of the heavens to the center of the earth, the right of the tenant for years is not necessarily coextensive with that of the owner of the fee, but the right of such tenant, unless expressly enlarged by the terms of the grant, is limited to the use and occupation of the demised premises in the condition in which they are at the time possession is received, and in this case a lateral excavation below the surface of the earth, extending a short distance below the property line between lot number one and lot number two, if any such excavation was made, was not necessarily a trespass upon the rights of
927 the plaintiffs, and the plaintiffs cannot recover in this action for any such excavation, even if the jury shall believe that such excavation was made, unless they shall satisfy the jury by a preponderance of the evidence that such excavation was the proximate cause of the destruction of the wall of the building occupied by the plaintiffs. (Trans. 847-8.)

XCVIII.

The court erred in refusing to instruct the jury as follows:

The court instructs the jury that the plaintiffs, under the lease offered in evidence by them, were bound to pay rent for the premises described therein, notwithstanding the destruction of the building upon the said premises by the wrongful act of the defendants or their employees; that a refusal of the plaintiffs to pay such rent, when the same by the terms of the lease became due and payable authorized the defendant Weinman to re-enter and take possession of the said premises without process of law, and the estate of the said plaintiffs in the said premises became and was terminated by said re-entry for the non-payment of rent, which non-payment of rent is admitted by the pleadings in this case. (Trans. 848-9.)

XCIX.

The court erred in refusing to instruct the jury as follows:

The court instructs the jury that there was no evidence in this case that it was necessary for the plaintiffs to remove to the
928 premises to which they did remove, or that such premises were at the time of removal suitable for the business which the plaintiffs proposed to carry on therein, or that plaintiffs might not have obtained other premises more suitable for their purposes and where their business would have been more profitable, and there is no evidence that the plaintiffs made any effort to find premises where they could carry on their business with the same profit as had been made in the Ruppe building, and there is no evidence that suitable premises might not have been obtained in the immediate vicinity of the place where plaintiffs had previously carried on business, and therefore the jury should disregard all evidence as to the loss of profits by the plaintiffs in this case. (Trans. 849.)

C.

The court erred in refusing to instruct the jury as follows:

The court instructs the jury that this is an action of tort in which the plaintiffs seek to recover damages for loss and damages to certain goods, wares and merchandise, as well as damages to loss of profits, which the plaintiffs claim they would have made but for the wrong of the defendants. You are instructed that if you find for the plaintiffs, you may, if you see fit to do so, give damages in the nature of interest over and above the value of the goods at the time of the injury, but you are not bound to do so and you are not at liberty to award to the plaintiffs interest to any other extent or on any other account. (Trans. 849-850.)

929

CI.

The court erred in refusing to accept the verdict of the jury as first returned into court. (Trans. 866.)

CII.

The court erred in instructing the jury before their retirement after first presenting their verdict, as follows:

GENTLEMEN: If by the verdict you have brought in assessing the plaintiffs' damages against the defendants at five thousand dollars with six per cent interest, you mean that something in the nature of interest up to the present time be added to the sum of five thousand dollars you name, you shall yourselves determine the amount, under the instructions given you, and it will be the better way to add to it whatever other sum you may find, so as to make one total. The court has no right to make the computation or determination for you. If it is not your intention to add anything in the nature of interest up to the present time, to said sum of five thousand dollars, you should make your meaning clear by your verdict.

Another blank form for a verdict will be furnished you to be filled out and returned as you have been instructed.

Following which instructions the court:

The COURT (to jury): I will add if there is anything about the law of the matter which you do not understand, you may ask the Court for further instructions. (Trans. 867-8.)

CIII.

The court erred in overruling the objection found on page
930 368 of the transcript as follows:

"To which remark of the court the defendants except. The defendants, Weinman and Barnett, each for himself excepts to the action of the court refusing to receive the verdict heretofore rendered by the jury as rendered by them and to the action of the court in returning the jury to the jury room for further deliberation, on the ground that the court has no power to do so. The defendants,

Jacob Weinman and Joseph Barnett object to the giving of this instruction by the court, or any other instruction at this time for the reason that the general verdict returned by this jury is plain and does not require any explanation and should be received by the court as it stands; for the further reason that there is no authority of law for the court giving the jury any instructions at this time; the instructions formerly given by the court on his own motion with reference to what the jury might do in finding damages in the nature of interest having been plain and requiring no explanation, and for the further reason that the court has no power or authority to do anything but to accept and receive the verdict as rendered by the jury." (Trans. 868.)

CIV.

The court erred in refusing [receiving] the second verdict of the jury. (Trans. 869.)

CV.

Said court erred in refusing to send up for examination by this court original Exhibits "I," "L," "M," "N-1" to "N-5" inclusive, and "O-1" and "O-2," it being impracticable to incorporate them in the Bill of Exceptions.

931 Wherefore, the said appellant prays that the said record and proceedings and judgment may be seen and examined by his honorable Court, the errors therein corrected, and that the said judgment may be reversed, and he may be restored to all things which he hath lost by reason thereof.

(Signed) NEILL B. FIELD,
Counsel for Appellant Barnett.

And afterwards, *on* to-wit, on the fourth day of January A. D., 1911, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico an assignment of errors in the above entitled cause, which said assignment of errors was and is in the following words and figures *following* towit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1911.

No. 1359.

RICHARD DI PALMA and BERNARD RUPPE, Appellees,
vs.
JACOB WEINMAN and JOSEPH BARNETT, Appellants.

Appeal from District Court, Bernalillo County.

Assignment of Errors.

Comes now the Appellant, Jacob A. Weinman, by Edward A. Mann, his attorney, and shows to the court that in the record, pro-

ceedings and judgment of the District Court of Bernalillo County in the above entitled cause there is manifest error in this, to wit:

932

I.

The court erred in permitting the witness Pitt Ross to testify for whom the said witness made the survey between lots one and two, block sixteen, in the town of Albuquerque, over the objections of the appellant, for the reasons that the same placed before a jury a false issue which was prejudicial to the defendant.

II.

The court erred in the admission of photographs marked "Exhibits D, E, F, and G," over this appellant's objection, because no proper foundation therefor was laid, and the same were incompetent for any purpose.

III.

The court erred in permitting the palintiffs to examine the witness J. L. La Driere, pages 254, 255, 256, 257, 258, 260, 261 and 262 of the record, as to the plans made by the witness for a double building upon both lots, after the wall fell, in that the same served to introduce a false issue before the jury and was prejudicial to the defendant.

IV.

933 The court erred in permitting plaintiffs to introduce in evidence their "Exhibit J," being the party wall agreement between defendants Barnett and Weinman, because the same did not tend to establish any of the issues in this case and tended to place before the jury a false issue.

V.

The court erred in permitting the plaintiffs to introduce in evidence its "Exhibit K" over the objections of the appellant Weinman, because the same purports to have been made between Joseph Barnett and C. A. Grande, and to be a contract to which appellant Weinman was a stranger and which was not binding upon him, and because no proper foundation therefor had been laid, and it was not shown that the copy introduced was in fact a true copy of the original contract.

VI.

The court erred in permitting the witness Ruppe to refresh his memory by examining one of the photographs heretofore referred to as Exhibit F, as to the supports of the roof of the building that fell, over the objection of defendant, and to which ruling of the court defendant duly excepted.

VII.

The court erred in permitting the witness Ruppe to testify on pages 300, 301 and 302 of the record, as to his efforts to find a loca-

tion in the same block as the building occupied by him, over defendants' objections, and to which ruling defendant duly excepted.

VIII.

The court erred in permitting the witness Ruppe to testify
934 as to where the business center of the city of Albuquerque was located, as the same being incompetent, irrelevant and immaterial, no proper foundation having been laid therefor.

IX.

The court erred in permitting the witness Ruppe to testify by comparing the location in the Grant block with that in the Weinman building, because no proper foundation was laid therefor, and the testimony of witness was a mere opinion which witness was not competent to give, and was not material to the issues in the case.

X.

The court erred in permitting the witness Ruppe to read from his bill of particulars in this case, or to refresh his recollection therefrom, as to the articles that were destroyed and their value, for the reason that the testimony of the witness showed that the original list from which the paper was alleged to have been copied was merely an estimate of the witness and others as to what had been lost and that the paper was not sufficiently shown to be a copy of the original list and for the reason that no proper foundation had been laid for the introduction of the copy.

XI.

The court erred in permitting the witness Ruppe to testify as to his expenses in moving his goods, the expense of a watchman, carpenter work tearing down the fixtures and re-placing them in the new location, for the reason that it was shown by the witness' own testimony that he had destroyed the best evidence of such
935 facts, and no sufficient foundation was laid for the introduction of secondary evidence therefor.

XII.

The court erred in permitting the witness Ruppe to testify as to the value of the electrical piano alleged to have been destroyed, as having been $600.00, for the reason that no proper foundation for such testimony had been laid, and the witness was not shown to be competent to testify as to the value.

XIII.

The court erred in permitting the witness Ruppe to testify that the value of the damaged goods not entirely destroyed was $800.00 for the reason that no proper foundation was laid therefor, and that the examination of witness shows conclusively that it was a

mere guess or estimate on his part, and that there was no opportunity for the jury to determine the correctness or error of witness' guess.

XIV.

The court erred in permitting the witness Ruppe to testify as to his cash receipts, his estimate of expenses and the estimated profits upon his cash receipts, and to allow the same to go before the jury as evidence of loss of profits, for the reason that there was no competent evidence as to what percentage of cash receipts were actual sales of merchandise during the time the appellees occupied the Weinman building; there was no competent evidence to show the gross profits upon the cash receipts of the business, and no
936 competent evidence as to the actual expenses of the business, and therefore the estimate of profits during the entire period of lease, which the witness was permitted to testify to, was a mere guess, based upon no competent evidence and that nothing was placed before the jury upon which they could arrive at the question of loss of profits, if any, suffered by the appellees during the continuance of the lease.

XV.

The court erred in permitting the question of loss of profits to go to the jury upon the partial set of books introduced by the appellees, coupled with the testimony of witness Ruppe, for the reason that the testimony shows that the witness Ruppe himself destroyed all that portion of his system of bookkeeping which would show the amount of merchandise on hand, the amount of capital invested, the expenses of the business, and the other elements entering into the question of loss of profits, leaving the whole evidence upon that question a mere guess of witness Ruppe as to what the profits of the business was during the time of the lease.

XVI.

The court erred in refusing to order the books introduced in evidence to be transmitted to this court for its inspection, for the reason that the admissibility of such books was a question of law for the court, and not one of fact for the jury, and that the appearance of the set of books in question, coupled with the testimony of witness Ruppe that no bookkeeper could take them and arrive from
937 them at an estimate of the volume and profits of the business, were in themselves sufficient to preclude their submission to the jury.

XVII.

The court erred in permitting the witness Ruppe to testify as to his total cash receipts during the time he was in the Grant building, and to estimate the gross profits thereon, and to estimate the expenses of the business during that time, for the reason that the estimates so made were mere guesses, based upon no competent evidence, and for the further reason that it was shown by witness that he had, him-

self, destroyed the primary evidence required to show the fact to which he testified.

XVIII.

The court erred in permitting the witness Ruppe to testify as to his total cash receipts during the time he was in the Armijo building, and to estimate the gross profits thereon, and to estimate the expenses of the business during that time, for the reason that the estimates so made were mere guesses, based upon no competent evidence, and for the further reason that it was shown by witness that he had, himself, destroyed the primary evidence required to show the fact to which he testified.

XIX.

The court erred in admitting the books of the appellees in evidence for the reason that they constituted an incomplete system as shown by testimony of witness Ruppe, that he had himself, destroyed the pass book and check book, which were a part of the sys-
938 tem, after the action was commenced; that the said books were in a mutilated condition, two pages of the ledger purporting to show the business relations between Ruppe and Di Palma having been removed, and cut out; that said books were mutilated by erasures and marking out of lines rendering them unintelligible.

XX.

The court erred in permitting the introduction of two leaves of papers alleged to have been the missing pages of the ledger, over the objection of the appellant, for the reason that the same were not identified by legal evidence, and they show upon their face that they are not free from suspicion of fraud, and were mutilated and unintelligible, and they appeared upon their face to be an effort on the part of plaintiffs to manufacture evidence for themselves.

XXI.

The court erred in permitting the witness Ruppe to testify on pages 397, 398, 399 and 400, as to why he removed the pages from the ledger, what he had done with them, and they were returned, over the objections of the appellant.

XXII.

The court erred in permitting the witness Ruppe to testify on page 400 of the record, as to a telephone conversation between Di Palma and Ruppe.

XXIII.

The court erred in permitting the witness Ruppe to testify as to trade conditions in the city of Albuquerque, during the time he was in the Weinman building and afterwards; to compare the
939 same with the conditions existing during the remainder of the lease while he occupied the Grant and Armijo buildings, for the reason that no foundation therefor was laid, that the same was

a more estimate of the witness, and that the jury were just as competent to judge as the witness himself from anything that appeared in the case; that the same was prejudicial to the appellant.

XXIV.

The court erred in refusing to instruct for a verdict for the appellant Weinman at the close of plaintiffs' case, for the reasons contained in the motion made at that time.

XXV.

The court erred in overruling the motion of Mr. Field, counsel for the co-appellant, to strike out certain portions of testimony in said case, for the reasons appearing in said motion, on pages 552, 553, 554, 555 and 556 of the record, and which said motion was joined in by this appellant.

XXVI.

The court erred in refusing to permit the appellant Weinman to amend his answer herein, which amended answer was offered to be filed on the 15th of January, 1910, and to which ruling of the court defendant duly excepted.

XXVII.

The court erred in overruling the motions of appellants Barnett and Weinman at the close of the case, to strike out certain portions of testimony as shown on pages 820, 821, 822, 823 and 824 of the record, and the motion of each of the appellants for a verdict
940 in their favor at the close of the case, and just prior to the submission thereof to the jury, as shown on pages 824 and 825 of the record.

XXVIII.

The court erred in refusing to accept the verdict of the jury rendered in this case on the 9th day of April, 1910, in words and figures following, to-wit:

"We the jury find the issues for the plaintiffs and assess their damage at five thousand dollars, at six per cent interest.

DIEGO P. ARMIJO, *Foreman.*"

for the reason that the same was a complete and lawful verdict, unambiguous and should have been received by the court as the verdict of the jury, but which said verdict the court refused to receive, to which refusal the appellants then and there duly excepted.

XXIX.

The court erred in giving to the said jury, after the return of said verdict the following instructions:

"GENTLEMEN: If by the verdict you have brought in assessing the plaintiffs' damages against the defendants at five thousand dollars

with six per cent interest, you mean that something in the nature of interest up to the present time be added to the sum of five thousand dollars you name, you shall yourselves determine the amount, under the instructions given you, and it will be the better way to add it to whatever other sum you may find, so as to make one total. The court has no right to make the computation or determination
941 for you. If it is not your intention to add anything in the nature of interest up to the present time, to said sum of five thousand dollars you should make your meaning clear by your verdict. Another blank form for a verdict will be furnished to you to be filled out and returned as you have been instructed."

To which the court added:

"I will add that if there is anything about the law of the matter which you do not understand you may ask the court for further instructions."

and to which the appellant duly excepted for the reasons given at page 868 of the record.

XXX.

The court erred in receiving the following verdict afterwards returned by the jury:

"We, the jury, find the issues for the plaintiffs, and assess their damages at seven thousand, seven hundred and thirty-eight dollars in total amount.

DIEGO P. ARMIJO, *Foreman.*"

XXXI.

The court erred in not rendering a judgment for the appellants upon the special verdict returned herein for the reason that such special verdict was favorable to the appellants, and shows that under the law said appellants were entitled to a judgment and because under the laws of this territory, the special verdict controls the general verdict.

XXXII.

The court erred in receiving the verdict of the jury for
942 the reason that the damages assessed by the jury are grossly excessive and indicate that the jury was influenced by ignorance, passion or prejudice against the defendants.

XXXIII.

The court erred in refusing to direct a verdict for the defendants, and each of them, at the close of the plaintiffs' case.

XXXIV.

The court erred in refusing to direct a verdict in favor of the defendants, and each of them, at the close of all the evidence.

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XXXV.

The court erred in submitting to the jury all evidence as to the removal of the stock of goods of plaintiffs, to the Grant building or the Armijo building, and of evidence as to the volume of business transacted in these places.

XXXVI.

The court erred in not excluding from the jury all evidence as to Ruppe's estimate of the expenses of the business carried on by plaintiffs, and the percentage of the gross profits derived therefrom.

XXXVII.

The court erred in the admission and rejection of evidence, which rulings were inconsistent with each other and were highly prejudicial to the defendants.

XXXVIII.

The court erred in giving to the jury Paragraph No. 1 of the charge of the court, because the same does not correctly state
943 the issues in the case, but ignores the defense that the wall of the plaintiffs' building fell because of inherent defects in its constructions, etc.

XXXIX.

The court erred in Paragraph Six of its charge to the jury.

XL.

The court erred in Paragraph Eight of its charge to the jury.

XLI.

The court erred in Paragraph Thirteen of its charge to the jury.

XLII.

The court erred in Paragraph Fourteen of its charge to the jury.

XLIII.

The court erred in Paragraph Fifteen of its charge to the jury.

XLIV.

The court erred in Paragraph Seventeen of its charge to the jury.

XLV.

The court erred in Paragraph Eighteen of its charge to the jury.

XLVI.

The court erred in Paragraph Twenty of its charge to the jury.

XLVII.

The court erred in Paragraph Twenty-seven of its charge to the jury.

XLVIII.

The court erred in refusing to give to the jury Instruction
944 No. One, asked by the defendant Weinman.

XLIX.

The court erred in refusing to give to the jury Instruction No. Two, asked by the defendant Weinman.

L.

The court erred in refusing to give to the jury Instruction No. Three asked by the defendant Weinman and in failing to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

LI.

The court erred in refusing to give to the jury Instruction No. Four asked by the defendant Weinman and failing to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

LII.

The court erred in refusing to give to the jury Instruction Number Five asked by the defendant Weinman and failing to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

LIII.

The court erred in refusing to give to the jury Instruction Number Six asked by the defendant Weinman, and failing to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

LIV.

The court erred in refusing to give to the jury Instruction
945 Number Seven asked by the defendant Weinman and failing to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

LV.

The court erred in refusing to give to the jury Instruction Number Nine asked by the defendant Weinman and failing to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

LVI.

The court erred in refusing to give to the jury Instruction Number Ten asked by the defendant Weinman and failing to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

LVII.

The court erred in refusing to give to the jury Instruction Number Eleven asked by the defendant Weinman and failing to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

LVIII.

The court erred in refusing to give to the jury Instruction Number Twelve asked by the defendant Weinman and failing to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

LVIX.

The court erred in refusing to give to the jury Instruction Thirteen asked by the defendant Weinman and failing to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

946

LX.

The court erred in refusing to give to the jury Instruction Number Fourteen asked by the defendant Weinman and failing to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

LXI.

The court erred in refusing to give to the jury Instruction Number Fifteen asked by the defendant Weinman and failing to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

LXII.

The court erred in refusing to give to the jury Instruction Number Sixteen asked by the defendant Weinman and failing to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

LXIII.

The court erred in refusing to give to the jury Instruction Number Seventeen asked by the defendant Weinman and failing to sign the same as required by the statute in such cases made and provided.

LXIV.

The court erred in refusing to give to the jury Instruction Number Eighteen asked by the defendant Weinman and failing to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

LXV.

The court erred in refusing to give to the jury Instruction
947 Number Nineteen asked by the defendant Weinman and failing to endorse his refusal thereon and sign the same as required by the statute in such cases made and provided.

LXVI.

The court erred in refusing to give to the jury Instruction Number Twenty asked by the defendant Weinman.

LXVII.

The court erred in refusing to give to the jury Instruction Number Twenty-one asked by the defendant Weinman.

LXVIII.

The court erred in refusing to instruct the jury as requested by the defendant Barnett.

EDWARD A. MANN,
Attorney for J. A. Weinman.

948 And afterwards, on to-wit at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe, the seat of Government, on the First Wednesday after the First Monday in January, 1911, on the first day thereof, the same being Wednesday the 4th day of January, the following among other proceedings were had and entered of record towit:—

No. 1359.

RICHARD DI PALMA & BERNARD RUPPE, Appellees,
vs.
J. A. WEINMAN and JOSEPH BARNETT, Appellants.

Appeal from District Court, Bernalillo County.

It is ordered by the court that the time for filing motion for diminution of the record in the above entitled cause be and the same hereby is extended until the 6th day of January, 1911.

And Afterwards, on to-wit on the 6th day of January, A. D. 1911, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a motion in the above entitled cause,

which said motion was and is in the following words and figures, to-wit:—

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1911.

No. 1859.

RICHARD DI PALMA and BERNARD RUPPE, Appellees,

vs.

J. A. WEINMAN and JOSEPH BARNETT, Appellants.

Appeal from District Court, Bernalillo County.

Motion.

Comes now the appellant Jacob A. Weinman, by Edward A. Mann, his attorney, and suggests to the court a diminution of the record in this cause, in that Exhibits I, L, M, N-1 to N-5 inclusive, and O-1 and O-2, were not incorporated into the Bill of
949 Exceptions in this case, the trial court holding that it was not necessary that said Exhibits appear, before this court.

This appellant alleges that it is material to the hearing of this cause in this court that the said Exhibits appear in the record herein, the same being the alleged books of accounts of the appellees and upon which is based appellees' claim for loss of profits in this cause; that the appearance of said books, by the way in which they are kept and their mutilated condition, if said books were before this court, would show that it was error in the trial court to admit them.

Wherefore Appellant moves that a writ of certiorari issue from this court commanding the Clerk of the Court of the Second Judicial — to forthwith certify to this court said exhibits I, L, M, N-1 to N-5 inclusive, and O-1 and O-2, and that the same may be taken as a part of the record in this cause.

JACOB A. WEINMAN,
By EDWARD A. MANN,
His Attorney.

And Afterwards, on towit: on the third day of the said regular term, the same being Friday January 6th, A. D., 1911, the following among other proceedings were had and entered of record to-wit:

No. 1859.

RICHARD DI PALMA and BERNARD RUPPE, Appellees,

vs.

J. A. WEINMAN and JOSEPH BARNETT, Appellants.

Appeal from District Court, Bernalillo County.

This cause coming on before the court upon the motion of appellants for a writ of certiorari directing the Clerk of the Second

Judicial District Court in and for the County of Bernalillo to send into this — Exhibits I, L, M, N-1 to N-5 and O1 and O-2 and the court having had said motion under advisement and being
950 now sufficiently advised in the premises grants the same. It is therefore considered and adjudged by the court that the Motion of appellants for a writ ff certiorari be and the same hereby is granted and that in accordance therewith, It is considered and adjudged by the court that the Clerk of the District Court in and for the County of Bernalillo, fort-with forward to the Clerk of the Supreme Court of the Territory of New Mexico, for use in the hearing of the above entitled cause Exhibits, I, L, M, N-1 to N-5 inclusive and O-1 and O-2 to be considered as a part of the record herein.

And Afterwards, on to-wit on the twenty-third day of January A. D., 1911 there was filed in the office of the Clerk of the said Supreme Court of the Territory of New Mexico a writ of certiorari and return thereto, which said writ of certiorari and return thereto, was and is in the following words and figures to-wit:

TERRITORY OF NEW MEXICO:

January Term, A. D. 1911.

To the District Clerk in and for the County of Bernalillo, in the Second Judicial District, Greeting:

Whereas, there has been filed in the Supreme Court of the Territory of New Mexico a motion for certiorari in a certain cause therein pending entitled Richard Di Palma and Bernard Ruppe, Appellees vs. Jacob Weinman and Joseph Barnett, numbered 1359, asking the court to order sent to this court certain exhibits as mentioned in said motion, and

Whereas, on the 6th day of January the Court had said motion under consideration, and being fully advised in the premises, granted the same and entered an order directing the clerk of this Court to issue a writ of certiorari to the Clerk of the District Court of the County of Bernalillo in the Second Judicial District commanding him to forthwith send to this court the exhibits mentioned in the motion of appellants in the above named cause,

Now, therefore, you, Thomas K. D. Maddison, Clerk of the District Court of the Second Judicial District in and for the County
951 of Bernalillo, hereby are commanded to forthwith send to the Clerk of the Supreme Court of the Territory of New Mexico, for the use of the Judges of the said Court in the consideration of the above named cause exhibits I, L, M, N-1 to N-5 inclusive and O-1 and O-2 and that you have the said exhibits in the said cause as filed in the trial of the said named cause in the District Court in the office of the Clerk of the Supreme Court together with this writ not later than the 24th day of January A. D., 1911.

Witness the Honorable William H. Pape, Chief Justice of the Supreme Court of the Territory of New Mexico and the seal of said Supreme Court this 19th day of January, A. D., 1911.

[SEAL.] (Signed) JOSE D. SENA, *Clerk.*

Return to Writ of Certiorari.

TERRITORY OF NEW MEXICO,
County of Bernalillo, ss:

I, the undersigned, Clerk of the District Court of the Second Judicial District of the Territory of New Mexico, within and for the county of Bernalillo, in obedience to the within Writ of Certiorari issued out of the Supreme Court of the Territory of New Mexico, January 19, 1911, to me directed, do hereby certify and transmit unto said Supreme Court the exhibits in said writ specified, to-wit, Exhibits I, L, M, N-1 to N-5 inclusive, and O-1 and O-2, as filed in the trial of the case of Richard Di Palma and Bernard Ruppe vs. Jacob A. Weinman and Joseph Barnett, in said District Court of Bernalillo County, (Attached to Exhibit I being attached Exhibits K and one).

Dated this 20th day of January, 1911.

[SEAL.] (Signed) THOS. K. D. MADDISON,
Clerk of the District Court, Second Judicial District, Territory of New Mexico, within and for the County of Bernalillo.

952 And Afterwards on to-wit on the sixth day of the said regular term, the same being Tuesday, January 24th, A. D., 1911 the following among other proceedings were had and entered of record to-wit:

No. 1359.

RICHARD DI PALMA and BERNARD RUPPE, Appellees,
vs.
J. A. WEINMAN and JOSEPH BARNETT, Appellant,

Appeal from District Court, Bernalillo County.

Now comes the attorney for appellants herein and asks the court for an order on the clerk of the District Cour- of the County of Bernalillo directing him to send to this court for the inspection of the court the Original Bill of Particulars in the above entitled cause and the court being sufficiently advised in the premises, grants the said motion. It is therefore considered and adjudged that the rule of this court issued against the said Clerk of the said District Court in and for the county of Bernalillo, commanding him to forthwith transmit to the clerk of this Court for the inspection of the Court the original bill of Particulars in the above entitled cause.

And Afterwards, on to-wit on the 24th day of January, A. D., 1911, there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico an affidavit by the clerk of the District Court in and for the County of Bernalillo which said affidavit was and is in the following words and figures towit.

TERRITORY OF NEW MEXICO,
County of Bernalillo, ss:

Thos. K. D. Maddison being duly sworn, on oath says that he is Clerk of the District Court of the Second Judicial District of the Territory of New Mexico, within and for the county of Bernalillo, and as such he prepared and certified the Transcript of Record in
958 the case of Richard Di Palma and Bernard Ruppe, Appellees, vs. J. A. Weinman and Joseph Barnett, Appellants, for use on the appeal now pending in the Supreme Court of the Territory of New Mexico.

Affiant further states that in comparing the bill of particulars as copied for the purpose of the transcript with the original bill of particulars filed in said cause, he noticed near the bottom of the last page, a strip of paper the same length as the paper on which said bill of particulars was written and about two inches wide, fastened to said last page by two paper fasteners, and containing the following words and figures, in typewriting, in the following form.

"Summary.

Loss on Stock	$657.87½
Freight, on Drugs	65.78
Loss on Fixtures	1,638.11
Damage to stock by soiling by dust, spilt medicine, etc.	500.00
Total loss	$2,861.76"

Affiant having a copy of the printed record used on the last appeal in said cause, noticed that this "Summary" did not appear in the transcript of said bill of particulars in said printed record, but not having examined the original bill of particulars before and having no knowledge of when or how the same became attached to said original, considered it a part of the same and that he could not certify the record as being a true and complete transcript unless the said "summary" was included therein, and hence did include the same in the record as certified.

(Signed) THOS. K. D. MADDISON.

Subscribed and sworn to before me this 24th day of December, 1910.

[SEAL.] (Signed) HAROLD B. JAMISON,
Notary Public.

And Afterwards on towit, on the 26th day of January, A. D., 1911, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a writ of certiorari with return thereto, which said writ of certiotari with return thereto was and is in the following words and figures towit:

954 TERRITORY OF NEW MEXICO:

To the District Clerk in and for the county of Bernalillo, in the Second Judicial District *Court*, Greeting:

Whereas on the 24th day of January, A. D., 1911, there was made to the Supreme Court of the Territory of New Mexico an oral motion in a certain cause therein pending entitled Richard Di Palma et al., Appellee, vs. J. A. Weinman, et al., Appellants, asking the court to direct the Clerk of the District Court of Bernalillo County to transmit to this court a certain Bill of Particulars in the above entitled cause, and

Whereas, the court had said motion under advisement and being sufficiently advised in the premises granted the same:

Now, therefore, You are hereby commanded to forthwith transmit to the Supreme Court of the Territory of New Mexico the Bill of Particulars in the above named cause, and that you have the same in this court by the 26th day of January, A. D., 1911, together with this writ.

Witness The Honorable William H. Pope, Chief Justice of the Supreme Court of the Territory of New Mexico, and the seal of the said Court this the 24th day of January A. D., 1911.

[SEAL.] (Signed) JOSE D. SENA, *Clerk.*

Return to Writ of Certiorari.

TERRITORY OF NEW MEXICO,
County of Bernalillo, ss:

I, the undersigned, Clerk of the District Court of the Second Judicial District of the Territory of New Mexico, within and for the County of Bernalillo, in obedience to the attached writ of Certiorari issued out of the Supreme Court of the Territory of New Mexico January 24th, 1911, to me directed, do hereby certify and transmit unto said Supreme Court the original bill of particulars filed in my office in the case of Richard Di Palma and B. Ruppe vs.

955 Jacob Weinman and Joe Barnett.

Witness my hand and the seal of said District Court this 25th day of January 1911.

[SEAL.] THOS. K. D. MADDISON,
Clerk of said District Court.

And Afterwards, *on* towit, on the seventeenth day of the said regular term of the said Supreme Court, the same being Thursday, March 2nd, A. D. 1901, the following among other proceedings were had and entered of record, viz:

No. 1859.

RICHARD DI PALMA and BERNARD RUPPE, Appellees,
vs.
J. A. WEINMAN and JOSEPH BARNETT, Appellants.

Appeal from District Court, Bernalillo County.

This cause coming on for hearing upon the transcript of record, assignment of errors and briefs of counsel, is submitted to the court on briefs and the court not being sufficiently advised in the premises, takes the same under advisement.

And Afterwards, *on* to wit, on the twenty-first day of the said regular term of the Supreme Court of the Territory of New Mexico, the same being Saturday August 26th, A. D., 1911, the following among other proceedings were had and entered of record to wit:

No. 1859.

RICHARD DI PALMA and BERNARD RUPPE, Appellees,
vs.
J. A. WEINMAN and JOSEPH BARNETT, Appellants.

Appeal from District Court, Bernalillo County.

This cause having been argued by counsel and submitted to
956 and taken under advisement by the court upon a former day of the present term, and being now sufficiently advised in the premises — announces its decision by Associate Justice Mechem, Chief Justice Pope and Associate Justices McFie, Parker, Wright and Roberts, concurring, affirming the judgment of the court below upon the filing by appellee- of a remit-ittur in the sum of $770, within ten days from the date hereof, if not reversing the same and remanding it for further proceedings, for reasons stated in the opinion of the Court on file, It is therefore considered and adjudged by the court that the judgment of the District Court within and for the County of Bernalillo whence this cause came into this court, be and the same hereby shall stand affirmed upon the filing by the appellee- herein a remit-ittur in the sum of seven hundred and seventy dollars within ten days from this date, and if not so filed the same shall stand reversed and be remanded to the District Court for further proceedings. It is further ordered adjudged and decreed that the appellants do have and recover of and from the appellees their costs in this behalf expended for which let execution issue.

And Afterwards, *on* to wit on the Thirty-fourth day of the said regular term, the same being Friday, September 1st, A. D., 1911 the following among other proceedings were had and entered of record towit:

No. 1359.

RICHARD DI PALMA and BERNARD RUPPE, Appellees,
vs.
J. A. WEINMAN and JOSEPH BARNETT, Appellants.

Appeal from District Court, Bernalillo County.

This cause coming on before the court upon the motion of appellees for further time within which to file motion for rehearing and further time within which to file remit-itur thereafter, and the court having had said motion under advisement and being sufficiently advised in the premises, grants the said motion. It is therefore considered and adjudged by the court that the appellee- do have until the sixteenth day of September within which time to file a motion for rehearing herein, and ten days thereafter within which time to file remit-itur in case the motion for rehearing is not filed.

957

It is further considered and adjudged by the court that should the appellee- herein fail to file motion for rehearing a final order herein either affirming or reversing shall be entered in this cause in vacation and it is so ordered.

And Afterwards, on towit, on the fourteenth day of September, A. D., 1911, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a motion for a rehearing in the above entitled cause, which said motion for rehearing was and is in the following words and figures towit:

TERRITORY OF NEW MEXICO:

In the Supreme Court, January Term, 1911.

No. 1359.

RICHARD DI PALMA et al., Appellees,
vs.
J. A. WEINMAN et al., Appellants.

Come now the plaintiffs in this cause, and move the Court for a rehearing and re-argument of the appeal herein, and for a reversal of the ruling of the Supreme Court, in so far as the same requires the plaintiffs to remit the sum of Seven Hundred and Seventy Dollars ($770) from the judgment as a condition to the affirmance of the judgment:

And for grounds of this motion, the appellees respectfully show and suggest:

1. That the Court overlooked the provisions of the evidence of the witness Ruppe contained in the record as to the damage to that portion of his stock injured but not destroyed.

2. That the Court overlooked the provisions of the opinion in the former decision of this case, to the effect that the plain-

958

[illegible]- was entitled to recover the damages to the goods damaged, but not destroyed, which decision is controlling on this hearing.

3. That the Court overlooked the marked difference between the evidence supporting the above item as given on the last trial from the evidence upon the same point in the former trial.

4. That the evidence upon the last trial is ample to support a verdict for some damages because of goods injured but not destroyed.

Appellees respectfully request leave to submit a printed brief upon this question.

MARRON & WOOD,
Attorneys for Appellees.

And Afterwards, *on* towit on the Thirty-seventh day of the said regular term, the same being Friday, December 1st, A. D., 1911, the following among other proceedings were had and entered of record towit:

No. 1359.

RICHARD DI PALMA and BERNARD RUPPE, Appellees,
vs.
J. A. WEINMAN and JOSEPH BARNETT, Appellants.

Appeal from District Court, Bernalillo County.

This cause coming on before the court upon a motion of appellee herein for a rehearing *and* the court having had said motion under advisement denies the same. It is therefore considered and adjudged by the court that the motion for rehearing herein be and the same hereby is denied.

It is further ordered and adjudged by the court that the appellee do have ten days from this day to file the remit-itur heretofore ordered, if they should so elect.

959 And Afterwards, *on* to-wit, on the fourth day of December, A. D., 1911, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a remit-itur by appellees, in the above entitled cause, which said remit-itur was and is in the following words and figures to-wit:

TERRITORY OF NEW MEXICO:

In the Supreme Court, January Term, 1911.

No. —.

RICHARD DI PALMA et al., Appellees,
vs.
J. W. WEINMAN et al., Appellants.

Comes now the plaintiff in this cause and excepting to the action of this Court in requiring them to remit the sum of Seven Hundred

and Seventy Dollars ($770.00) from the judgment of the District Court as a condition to the affirmance of the judgment and being constrained thereto by said order do hereby consent and stipulate the sum of Seven Hundred Seventy Dollars ($770.00) being deducted and remitted from the judgment of the District Court as entered in this cause.

RICHARD DI PALMA,
BERNARD RUPPE,
Plaintiffs.

Dated This Second Day of December, 1911.

MARRON & WOOD,
Attorneys for Plaintiffs.

TERRITORY OF NEW MEXICO,
County of Bernalillo, ss:

On this second day of December, 1911 before me the undersigned, a Notary Public in and for the said county, personally appeared Bernard Ruppe to me known to be the same person named in and who executed the foregoing stipulation and he acknowledged to me that he was duly authorized to execute the same and did execute the same for and on behalf of himself and the other plaintiff in said cause as the free act and deed of each of them.

(Signed) BERNARD RUPPE.

Witness my hand and seal this second day of December, 1911.

[SEAL.] VIOLA A. JONES,
Notary Public.

My Commission expires Sept 16 1915.

And Afterwards, *on* to wit on the Fortieth day of the said regular term, the same being Tuesday December 5th A. D. 1911, the following among other proceedings were had and entered of record to wit:

No. 1359.

RICHARD DI PALMA and BERNARD RUPPE, Appellees,
vs.
JACOB WEINMAN and JOSEPH BARNETT, Appellants.

Appeal from District Court, Bernalillo County.

This cause again coming on before the court upon the filing of the remit-itur by appellees as heretofore ordered by the court in the sum of Seven Hundred Seventy Dollars ($770.00) and the appellees having acquiesced to the said requirement of the court hereby file their remit-itur in the sum of Seven Hundred Seventy Dollars ($770.00) and the court being sufficiently advised in the premises it is considered and adjudged by the court that the judgment of the District Court in and for the County of Bernalillo whence this cause came into this court, be and the same hereby is modified and that as so modified the said judgment of the said district court be and the

same hereby is affirmed, It is therefore considered and adjudged by the Court that the said appellees Richard Di Palma and Bernard Ruppe, do have and recover of and from Jacob A. Weinman and Joseph Barnett the sum of Six Thousand Nine Hundred and sixty eight 00/100 Dollars ($6,968.00) with interest thereon at the rate of six per cent per annum from the 9th day of April, A. D.,
961 1910 the day upon which the verdict of the jury was rendered and that they have execution therefor.

It is further considered and adjudged and decreed by the court that the said appellees Richard Di Palma and Bernard Ruppe, do have and recover of and from Jacob A. Weinman and Joseph Barnett as principals and M. W. Flournoy and Ivan Grunsfeld, as sureties the sum of Six Thousand Nine Hundred and Sixty-eight Dollars ($6,968.00) together with interest thereon at the rate of six per cent per annum from the 9th day of April, A. D., 1910.

It is further considered adjudged and decreed by the court that the appellants do have and recover from and of the appellees their costs in this behalf expended in this appeal for which let execution issue.

And Afterwards, on to wit on the 19th day of December, A. D., 1911 there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a supersedeas Bond in the above entitled cause, which said supersedeas Bond was and is in the following words and figures towit:

Know all men by these presents: that we, Jacob Weinman, Joseph Barnett, M. W. Flournoy and Ivan Grunsfeld as principals and J. B. Herndon and W. L. Trimble as their sureties, are held and firmly bound unto Richard Di Palma and Bernard Ruppe, in the penal sum of Fourteen Thousand ($14,000) Dollars, to the payment whereof well and truly to be made we bind ourselves, our heirs, executors and successors, jointly and severally, firmly by these presents.

The conditions of the foregoing obligation are such that

Whereas, on the 16th day of January, A. D., 1910, the above named Richard Di Palma and Bernard Ruppe recovered judgment in the District Court of the Second Judicial District of the Territory of New Mexico, sitting within and for the County of Bernalillo, against Jacob Weinman and Joseph Barnett in the sum of
962 $7,738, together with interest and costs of suit, and

Whereas, the said judgment was taken on appeal to the Supreme Court of the Territory of New Mexico, and M. W. Flournoy and Ivan Grunsfeld became sureties on the supersedeas bond of the said Jacob Weinman and Joseph Barnett, and

Whereas, on the 5th day of December, A. D., 1911, the said judgment of the District Court was by the Supreme Court of the Territory of New Mexico modified on a remittitur filed by the said Richard Di Palma and Bernard Ruppe, and judgment was rendered in the said Supreme Court against the said Jacob Weinman and Joseph Barnett as principals and M. W. Flournoy and Ivan Grunsfeld as sureties, for the sum of $6,968, with interest but with costs in favor of the said Jacob Weinman and Joseph Barnett in the said Supreme Court, and

Whereas, the above bounden Jacob Weinman, Joseph Barnett, M. W. Flournoy and Ivan Grunsfeld have sued out a writ of error from the Supreme Court of the United States to the said Supreme Court of the Territory of New Mexico, and have been required to give a supersedeas bond upon the said writ of error in the penal sum of $14,000.

Now, therefore, if the said Jacob Weinman, Joseph Barnett, M. W. Flournoy and Ivan Grunsfeld shall prosecute their said writ of error to effect and answer all damages and costs if the said writ of error be dismissed or the said judgment of the Supreme Court of the Territory of New Mexico be affirmed, or they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

(Signed) JACOB A. WEINMAN. [SEAL.]
JOE BARNETT. [SEAL.]
M. W. FLOURNOY. [SEAL.]
IVAN GRUNSFELD. [SEAL.]
J. B. HERNDON. [SEAL.]
W. L. TRIMBLE. [SEAL.]

968 TERRITORY OF NEW MEXICO,
County of Bernalillo, ss:

On this eighteenth day of December, A. D., 1911, before me personally appeared Jacob Weinman, Joseph Barnett, M. W. Flournoy, Ivan Grunsfeld, J. B. Herndon and W. L. Trimble, to me known to be the persons who executed the foregoing instrument, and acknowledged each one for himself and not one for the other, that they executed the same as their free acts and deeds.

In witness whereof I have hereunto set my hand and notarial seal the day and year in this certificate first written.

(Signed) WILLIAM WILCOX,
Notary Public, Bernalillo Co., N. M.

My Commission expires October 26th, 1915.

Approved as to form and sufficiency: This Dec. 19th, 1911.
WILLIAM H. POPE,
Chief Justice, etc.

And afterwards, *on* to wit on the Forty-fifth day of the said regular term, the same being December 19th, A. D., 1911, the following among other proceedings were had and entered of record, towit:—

No. 1359.

RICHARD DI PALMA and BERNARD RUPPE, Appellees,
vs.
JACOB A. WEINMAN and JOE BARNETT, *Appellees.*

Appeal from District Court, Bernalillo County.

This cause coming on before the court upon a motion of Neill B. Field Attorney for plaintiffs in error asking the court to direct the

clerk of this Court to transmit to the Clerk of the Supreme Court of the United States, all the exhibits received by him from the Clerk of the District Court in and for the County in Bernalillo, and on file with him in this office, in the above entitled cause and the
954 court being sufficiently advised in the premises grants the said motion. It is therefore considered and adjudged by the court that the motion of plaintiffs in error in the above entitled cause be and the same hereby is granted and the Clerk of this Court hereby is directed to transmit to the Clerk of the Supreme Court of the United States together with the transcript of record, all the exhibits transmitted to him by the Clerk of the District Court in and for the County of Bernalillo, and now on file in the office of the said Clerk of this Court, that the same may be considered by the said Supreme Court of the United States as a part of the record in the above entitled cause.

And Afterwards, on towit: on the 4th day of January, A. D., 1912, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an assignment of errors on writ of error to the Supreme Court of the United States which said assignment of errors was and is in the following words and figures, towit:—

955 In the Supreme Court of the United States.

JACOB A. WEINMAN, JOSEPH BARNETT, M. W. FLOURNOY, and IVAN GRUNSFELD, Plaintiffs in Error,

vs.

RICHARD DI PALMA and BERNARD RUPPE, Defendants in Error.

Assignment of Errors.

Come now the plaintiffs in error, by their attorneys, and show to the court that in the record, proceedings and judgment of the Supreme Court of New Mexico there is manifest error to the prejudice of the plaintiffs in error, and they specify the following as errors therein:

I.

The district court erred in permitting the witness La Driere to be examined with reference to having drawn plans for a building to cover both lots one and two prior to the falling of the wall in question in this case and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

II.

The district court erred in admitting in evidence the specifications offered by defendants in error, and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

III.

The district court erred in admitting in evidence the party wall agreement, and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

IV.

The district court erred in admitting in evidence the contract, "Exhibit K", and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

996

V.

The district court erred in admitting in evidence "Exhibit H," foundation plans, and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

VI.

The district court erred in permitting the defendants in error to give evidence as to their efforts to find a new location, and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

VII.

The district court erred in overruling the objection of plaintiffs in error to the following question:

"Q. From your experience as a merchant in Albuquerque, as you have given it, do you know how the building—how the store in the Grant building to which you moved, compared as a business location for a drug store with the store—with the building that fell, that you had formerly occupied?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

VIII.

The district court erred in permitting the witness Ruppe to testify that the location of the store in the Grant building was very inferior to the location of the building that fell for purposes of carrying on a drug business, and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

IX.

The district court erred in overruling the objection to the question:

"Q. What did you say as to whether or not the list as you made it up was correct so far as it went, of the articles that had been destroyed?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

X.

The district court erred in overruling the objection to the
967 following question:

"Q. Now, did you make from that book a copy of the memorandum of the goods lost, which was contained in it?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XI.

The district court erred in permitting counsel for defendants in error persistently to lead the witness Ruppe, and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XII.

The district court erred in permitting the witness Ruppe to refresh his recollection from the bill of particulars, and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XIII.

The district court erred in overruling the objection to the question:

"Q. Will you please refer to the bill of particulars that you have mentioned, and refresh your recollection and tell us what articles were destroyed, and their value?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XIV.

The district court erred in permitting the defendants in error to give evidence of the expense of removing from the Weinman building to the Grant building, and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XV.

The district court erred in permitting the defendants in error to give evidence that the value of the goods damaged immediately before the fall of the wall was $800, and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

968 XVI.

The district court erred in permitting the defendants in error to give evidence that the value of the goods damaged immediately after

the fall of the wall and after they were separated was $300.00, and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XVII.

The district court erred in permitting defendants in error to give evidence as to the daily cash receipts of their business, and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XVIII.

The district court erred in overruling the objection:

"And on behalf of Mr. Barnett I object that: all of it is testimony for the purpose of laying foundation for secondary evidence, and is not competent to go to the jury in any case, and tends to mislead the jury as to what they are called upon to try, and because the question of what may have been done or left undone at any former trial of this case, does not change the rules of evidence."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XIX.

The district court erred in overruling the objection:

"I wish to make an objection also, if the court please, on behalf of defendant Barnett, to the introduction of parts of this book now offered, because when it is attempted to prove loss of profits in such a case as this, it is necessary that the parties relying on such evidence shall present at least such a complete set of accounts as will enable a bookkeeper to ascertain the amount of capital employed in the business, the expense of conducting it, its income and profits, from the books themselves, and that it is incompetent to offer anything less than a complete system of accounts of such character as is indicated; and such accounts, when offered, as the basis of proof of loss of profits, cannot be supplemented by oral testimony of estimates of profits; the books and accounts offered in evidence must be reasonably complete in themselves and must appear to have been a reasonably complete set of accounts and not a mutilated set or part of a set, or less than such a set of accounts as is indicated by the objection."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

969

XX.

The district court erred in overruling the objection:

"I object, for the reason that evidence of this character is incompetent for any purpose unless accompanied by similar evidence as to disbursements and such a set of accounts as will enable a bookkeeper to take the accounts and verify the results of the witness's testimony. In other words that it is incompetent to present a part of the set of

books and from that to attempt to show receipts without showing also the disbursements in the same way by similar evidence, so that the question of loss of profits, if any, can be verified."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XXI.

The district court erred in overruling the objection to the question:

Q. "Now, Mr. Ruppe, can you tell us whether or not in your business as a druggist you had any system of selling prices from which you can determine the amount of your receipts from the sale of goods over their cost price to you?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XXII.

The district court erred in refusing to strike out the answer:

"A. A good many of the medicines came with the price marked thereon; others we figured the cost, and what they are worth at retail is marked thereon; prescriptions are compounded and the profit is figured on the drugs and the time used in preparing the same. Certain goods such as sundries and articles of luxury are generally figured at a percentage ranging from fifty to one hundred per cent; prescription compounding must bring more than one hundred per cent; patent medicine profits range all the way from 25 to 35 per cent; in my experience as a druggist, in figuring the profits that I have made in my business I figure that my business produced me an average of forty per cent gross."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XXIII.

The district court erred in refusing to strike out the answer:

"A. My knowledge of the business permits me to state that I make 40 per cent on my sales."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

970 XXIV.

The district court erred in overruling the objection:

"I object to that because it is not competent in such an inquiry as this, to show receipts by books and expenditures by oral testimony but in order to lay a foundation for recovery of loss of profits, there must be such a system of accounts presented as will enable a bookkeeper to take those accounts and, with reasonable certainty, determine the extent of the profits."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XXV.

The district court erred in overruling the objection to the question:

"Q. State, if you can, then, Mr. Ruppe, what your monthly expenses were in the operation of that business during the time that you were in the Weinman building."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XXVI.

The district court erred in overruling the motion to strike out the answer:

"A. One-half in December, 1901, $217; January, $434; February, $434; March, $434; April, $434; May, $434; June, $434, making a total expense of $2,821."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XXVII.

The district court erred in overruling the objection to the question:

"Q. Now, can you give us the average daily cash receipts by the month for the period of time in question?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XXVIII.

The district court erred in overruling the objection to the question:

971 "Q. Do you know what your average daily sales were during that period?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XXIX.

The district court erred in overruling the objection to the question:

"Q. Did you keep in your books a record each day of the total daily sales?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XXX.

The district court erred in overruling the objection to the question:

"Q. How, then, can you tell us the daily sales or the average daily sales?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XXXI.

The district court erred in overruling the motion to strike out the answer:

"A. By figuring at the end of the month the outstanding accounts due me, and that showed me that my business between cash and credit was the same on the average."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XXXII.

The district court erred in overruling the objection to the question:

"Q. Do you know what the ordinary rates of interest on money was here in Albuquerque during that time?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XXXIII.

The district court erred in overruling the objection:

"We make the objection that we did not invite him to go into business at any other place; that what he did in any other place is wholly immaterial, irrelevant and incompetent."

972 And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XXXIV.

The district court erred in overruling the objection to the question:

"Q. Now, where was that location with reference to the business center of the city, as you have already described it?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XXXV.

The district court erred in overruling the objection to the question:

"Q. Tell us, what, if any, efforts you made after removing to the Grant building, to find a more favorable location?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XXXVI.

The district court erred in overruling the motion to strike out the answer:

"A. I tried to rent the Barnett corner, or the one at present occupied by Mr. Matson. I saw Mr. Lewinson, of the Economist, and tried to rent half of his store."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XXXVII.

The district court erred in overruling the objection to the question:

"Q. Were you able to find, at or prior to the time that you removed into the Armijo building, any location nearer to the business center than you have described, as you have described it—than the Armijo building?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

973 XXXVIII.

The district court erred in overruling the objection to the question:

"Q. Do you know, from your experience as a business man in Albuquerque, as you have testified to it, how the stand in the N. T. Armijo building, to which you removed, compared as a business location for the drug business, with the stand in the Grant building?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XXXIX.

The district court erred in overruling the objection to the question:

"Q. And how did the location in the Armijo building compare with the location in the Weinman building?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XL.

The district court erred in overruling the motion to strike out the answer:

"A. The location I occupy at present is inferior to the one I formerly occupied in the Weinman building."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XLI.

The district court erred in admitting in evidence receipts in the Armijo building, and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XLII.

The district court erred in overruling the objection to the question:

"Q. Mr. Ruppe, can you tell us how much capital you had invested in your business while you were in the Grant building, in the Armijo building, during the period which you have just testified?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

974 XLIII.

The district court erred in overruling the objection to the question:

"Q. Do you know what was the rate of interest ordinarily received on moneys during that period: do you know what the ordinary rate of interest was which money was earning in Albuquerque during that period while you were in the Grant building and the Armijo building?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XLIV.

The district court erred in overruling the objection:

"And further, it affirmatively appears from the testimony of the witness that no system of accounts was kept whereby the capital invested in the business, the receipts or expenditures or profits could be reasonably ascertained."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XLV.

The district court erred in admitting in evidence five books, and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XLVI.

The district court erred in overruling the objection:

"We make now, the general objection that the book as presented is in a mutilated condition, pages 213 and 214 being obviously cut out, and others, which I will specify when my attention is called to the numbers—otherwise, I will ask an opportunity to look through it now.

Mr. Wood: 181-2-3-4 were also cut out.

Mr. Field: And the further objection that pages 181 to 184, inclusive, have been taken out, and that the book, upon its face, is mutilated by erasures and the marking out of lines, and is otherwise unintelligible; and that all the books offered by the plaintiffs do not comprise a whole system of accounts, as testified to by him; that he had a pass book and check book which were part of this system and which he intentionally destroyed after the rights of the parties to this action became fixed."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

975 XLVII.

The district court erred in overruling the motion to strike out the answer:

"A. I immediately telephoned to Trinidad, Colorado, and after two days succeeded in locating Father Di Palma, requested him to send them at once, and immediately put them into the safe in Mr. Wood's office."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XLVIII.

The district court erred in overruling the motion to strike out the answer:

"A. To show him what cash and medicines were charged to his account."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XLIX.

The district court erred in overruling the objection to the question:

"Q. Well, Mr. Ruppe, have you examined this book which you have offered in evidence, for the purpose of determining what, if any, bad debts were incurred by you because of merchandise sold during the period of the Weinman lease?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

L.

The district court erred in overruling the objection:

"I wish to make objection on behalf of Defendant Barnett: I join in the objection of the Defendant Weinman and make the further objection that evidence as to the amount of bad debts incurred, without evidence as to the amount of purchases or sales of merchandise, is incompetent and merely tends to mislead the jury, and sheds no light upon the issues in this cause.

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

LI.

The district court erred in overruling the objection to the question:

976 "Q. Mr. Ruppe, from your experience as a merchant during the time in question, do you know what the conditions of trade in Albuquerque were for a year and a half subsequent to the fall of the wall?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

LII.

The district court erred in overruling the objection to the question:

"Q. How did it compare with the conditions of trade as they existed in Albuquerque during the time you were in the Weinman building?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

LIII.

The district court erred in overruling the motion to strike out the answer:

"A. Conditions were getting better."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

LIV.

The district court erred in overruling the motion to strike out the answer:

"A. I have not produced them because I was not required to do so."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

LV.

The district court erred in overruling the motion to strike out the answer:

"A. My answer to that undoubtedly indicates that I referred to the list as made out here by me."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

LVI.

The district court erred in overruling the motion to strike
977 out the answer:

"A. Because undoubtedly, the same as I said before, I must have had on my mind in answering that question that list I prepared."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

LVII.

The district court erred in sustaining the objection to the question:

"Q. Didn't he tell you that they were going to dig under your wall and put a footing in there and put up a straight brick wall which would straighten the wall in your store?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

LVIII.

The district court erred in sustaining the objection to the question:

"Q. What, if anything, did you do toward preparing for the possible weakening of that wall, during the process of that excavation?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

LIX.

The district court erred in overruling the motion to strike out the testimony as follows:

"The defendant Weinman mokes to strike out all the testimony of this witness with reference to the value of the electric piano, for the reason that the witness has shown that all he knows is what he paid for it, which is not the true measure of value; and also moves to strike out the testimony of the witness with reference to the back shelving because it is shown to be based upon hearsay and not upon any knowledge of the witness."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

LX.

The district court erred in overruling the motion of the plaintiff in error Barnett:

978 "On behalf of the Defendant, Barnett, I desire to move to strike out certain portions of the testimony: In the first place I desire to move to strike out all of the books of account offered in evidence on behalf of the plaintiffs in this case for the reason that it affirmatively appears that these books of account are not in themselves—do not constitute in themselves a complete system of accounts from which a bookkeeper could ascertain the amount of capital embarked in this business, or the amount of business actually conducted or the profits thereof; that it is impossible to ascertain from these books of account the merchandise purchased and the amount of expense incurred in the conduct of the business, and also that no foundation has been laid for the introduction of them as books of account under the requirements of the statute of this territory in such cases; that by the laws of the Territory of New Mexico, Section 2650 of the Compiled Laws of 1897, and that chapter generally, a partnership is required to keep their books in due form and inventory their stock and actually keep account of all the business that they transact; that these books do not conform to that requirement; further, that it affirmatively appears that at and before the

institution of this suit, and afterwards, plaintiffs had in their possession other evidence of a documentary character, which, taken in connection with the books of account produced here, would have enabled a bookkeeper—or a person familiar with accounts—to ascertain the extent of the business transacted by the plaintiffs, the amount of the profits and expenses—all other necessary data, and it affirmatively appears that that documentary evidence was intentionally destroyed by one of the plaintiffs, Bernard Ruppe, or under his direction."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

LXI.

The district court erred in overruling the motion of the plaintiff in error Barnett:

"I further move to strike out all of the evidence of the witness, Bernard Ruppe, with reference to the value of the goods that were damaged and the extent of damage to those goods, for the reason that there is no legal evidence which would authorize the court to submit to the jury the question of such damages, and for the further reason that no such damages are claimed in complaint, and no such item is contained in the bill of particulars made under the order of the court."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

LXII.

The district court erred in overruling the motion of the plaintiff in error Barnett:

"I further move the court to strike out all of the testimony of the witness, Ruppe, which was given after refreshing his recollection by the use of the bill of particulars while he was on the witness stand, for the reason that no proper foundation was laid for permission to the witness to use the bill of particulars for the purpose of refreshing his recollection; and it affirmatively appears that that bill of particulars was a copy of another list which was contained in
979 a book which was lost; that the loss of that book was not sufficiently established, and for the further reason that if the book were here it was not such a memorandum as under settled rules of evidence the witness, Ruppe, would be permitted to refer to for the purpose of refreshing his recollection; it affirmatively appearing that it was not made at or near to the time of the transaction with which it purports to deal; was not made on Ruppe's personal knowledge, but was made up over a period of months of time in which he listed in that book such articles of merchandise as he missed out of his stock, for months after the fall of the wall, and upon consultation with Baltes and Mallette, his clerks; and that he put on that list such articles of merchandise as were not found in his stock from time to time, whenever he did not remember that they had been sold, or whenever Mallette did not remember that they had

been sold, or whenever all or any one of these remembered that they had had those things in stock before the removal from the building which fell down; and it further affirmatively appears that this was not a writing which was shown by the witness to be correct at the time it was made, or one which he would be authorised under the law to inspect for the purpose of refreshing his memory; neither was the writing, or a copy of it, legal evidence of any fact therein contained."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

LXIII.

The district court erred in overruling the motion of the plaintiff in error Barnett:

"I move to strike out all of the testimony of the witness, Ruppe, with reference to the character of the business section of the town of Albuquerque and the relative—I do not remember just what term was used—availability, I will say that—the witness did not say that—availability of its purpose—of the various places to which he moved after the fall of the wall, and his opinion as to how much better a place of business the one which he rented from Weinman was to the other places to which he moved—the relative availability of the business location, because no proper foundation was laid for such evidence, and in the second place there is no evidence that the defendants, or either of them, notified Mr. Ruppe to engage in business at any other place, except the Weinman place, and testimony as to these points, to which, by this particular objection attention is called, tends to mislead the jury and introduced a false issue in the case."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

LXIV.

The district court erred in overruling the motion of the plaintiff in error Barnett:

"I move to strike out all of the testimony of the witness, Ruppe, with reference to the loss of profits, as well as all the testimony as to the amount of cash sales and his estimate of expenses, and
980 of all testimony of that character, because in the first place no proper foundation was laid for it, and in the second place it was largely opinion evidence, and in the third place the evidence is wholly insufficient taken as a whole, together with all the other evidence in the case, to authorize the court to submit to the jury the question of loss of profits."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

LXV.

The district court erred in sustaining the objection to the question:

"Q. Well, what was the condition of the foundation over the excavation at the northeast corner of the wall?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

LXVI.

The district court erred in overruling the objection to the question:

"Q. Well, was this testimony, as you gave it then, true according to your recollection as it was then?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

LXVII.

The district court erred in sustaining the objection to the question:

"Q. Now, I want to ask you again: if you did not tell me in my office last Saturday afternoon that at the time this foundation was uncovered you were working at the brewery, and Ed Steiner was in charge of the work."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

LXVIII.

The district court erred in sustaining the objection to the question:

"Q. Now, state Mr. La Driere, whether or not that wall was ever built, or that foundation plan that you have testified to, was ever carried out?"

And the Supreme Court of New Mexico erred in refusing
981 and failing to consider such action of the district court as erroneous.

LXIX.

The district court erred in sustaining the objection to the question:

"Q. Now testifying from your experience as an architect, and your knowledge of the conditions that existed, state whether or not that party wall might have been built according to the plans and specifications, with safety to the Ruppe wall, had it been a solid wall, firm, straight and in line?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

LXX.

The district court erred in overruling the objection to the question:

"Q. If you did so testify was that testimony true?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

LXXI.

The district court erred in overruling the objection to the question:

"Q. Well, is your recollection better or poorer now as to those facts, than it was when you testified upon that trial in 1906?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

LXXII.

The district court erred in permitting defendants in error to read in evidence the release from Weinman to Barnett, and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

LXXIII.

The district court erred in overruling the objection to the question:

982 "Q. Would your answer have been the same had there been two successive excavations under the front end of the wall, each of them approximately five feet in length and extending substantially, or quite, under the wall, with a pier of dirt between, four or five feet in length?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

LXXIV.

The district court erred in overruling the motions to strike out the evidence renewed, and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

LXXV.

The district court erred in giving to the jury paragraph One of the charge, and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

LXXVI.

The district court erred in giving to the jury Paragraph Six of the charge:

"You are further instructed that if you believe from the evidence that one of the plaintiffs, B. Ruppe, stood by, knowing the kind of wall that was to be erected, where it was to be placed, and the manner in which the same was to be erected and acquiesced in the erection of the same, and by his conduct, led the defendants to believe that he acquiesced and consented to the erection of

the same, as it was to be erected, then the plaintiffs are estopped from recovering in this action for damages occasioned by doing anything to which they so consented. But if the plaintiff, Ruppe, was misled by representations made by or in behalf of the defendants, or either of them, as to the safety of what it was proposed to do, and was not so well qualified to judge as to their truth, as were those who made them, and for that reason acquiesced, then the plaintiffs are not estopped by such asquiescence."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

LXXVII.

The district court erred in giving to the jury Paragraph Eight of the charge:

"You are further instructed that unless you believe from a preponderance of the evidence that the wall of the building occupied by the plaintiffs fell by reason of excavation made upon lot number 2 in block 16, that such excavation so made upon lot number 2 *and*
983 block 16 was the proximate cause of the fall of the said wall, you should find the issues for the defendants; otherwise you should find the issues for the plaintiffs."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

LXXVIII.

The district court erred in giving to the jury Paragraph Thirteen of the charge:

"You are further instructed that the defendant Weinman had no lawful right, without the consent of the plaintiffs, to go upon lot 2 if it was occupied by the plaintiffs as his tenant under the lease in evidence, and to erect a wall on the line between said lot 1 and 2, a part on each lot, or to tear down the wall or any portion thereof, of the building so occupied by the plaintiffs, and that he could not give the defendant Barnett any lawful right to do that which he, the defendant Weinman, had not the right to do."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

LXXIX.

The district court erred in giving to the jury Paragraph Fourteen of the charge:

"You are instructed that any actual expulsion of the tenants by the landlord or by any person acting by his authority, or anything so done which so seriously disturbs the tenants' possession as to compel an abandonment of the premises by them, or which deprives *him* of their beneficial enjoyment, amounts to an eviction and the rent is suspended from the time of such expulsion or disturbance."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

LXXX.

The district court erred in giving to the jury Paragraph Fifteen of the charge:

"You are further instructed that if you find from a preponderance of evidence that the defendant Barnett, in pursuance of the contract between himself and the defendant Weinman and without the consent of the plaintiffs, caused excavations to be made on said lot 2, or any portion thereof, either by his agents or servants, or by any independent contractor, then both these defendants, Weinman and Barnett, were equally guilty of trespass, and it is immaterial that the parties doing the work were also trespassers because the plaintiffs had the right to sue any one or more of those guilty of trespass."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

984

LXXXI.

The district court erred in giving to the jury Paragraph Seventeen of the charge:

"If you find from a preponderance of the evidence that said defendants committed the acts complained of by said plaintiffs, and you further find that the plaintiffs were damaged thereby, then you will find from the evidence the amount which was the natural and proximate consequence of the said wrongful act of the defendant-, and your verdict should be in such amount as will compensate the plaintiffs for the damage suffered."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

LXXXII.

The district court erred in giving to the jury Paragraph Eighteen of the charge:

"You are further instructed that in arriving at said amount you may take into consideration the testimony regarding the loss of profits occasioned by the removal to another location, the testimony regarding the value of the stock of merchandise and fixtures destroyed, if any were destroyed, and the testimony regarding the injury and damage, if any, to the remaining stock and fixtures, the testimony regarding reasonable expenses in removing to another location, and the repair of the fixtures and furniture partially destroyed, and the testimony regarding such other items to which it relates, as are the proximate consequences of the acts of the defendants, if you believe from a preponderance of the evidence that the acts of the defendants complained of were the proximate cause of any loss or damage to the plaintiffs."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

LXXXIII.

The district court erred in giving to the jury Paragraph Nineteen of the charge:

"You are instructed that an established business is capable of injury or destruction, as a house or other material object is, but in the nature of the case it is much more difficult to determine the value of a business destroyed or the amount of damages to it if injured than it is to determine the value of a house or the injury to it. To illustrate, a man may have an established business of growing vegetables for the market and may have customers in his neighborhood who are in the habit of buying of him; he may have a lease of a parcel of land on which he grows the vegetables on which crops will not grow without irrigation. The land may be irrigated from a stream which is the only source from which it could be irrigated. That stream might be diverted at its source by the work of man or by some convulsion of nature, so that it would be no longer possible to irrigate the land. In that way his business might be wholly destroyed. If he could get other land, not too far from his customers on which he could grow vegetables his business
985 might not be destroyed or even injured. It might cost him something to make the necessary changes, but that would not be injury to his business as such. Injury to the business would consist in loss of trade or greater expense in supplying his cutomers, or both. To show what the injury to the business was, evidence in relation to the profits before and after the change would be admissible, but would not be alone and in itself conclusive.

If under instructions given you and on the evidence you have heard, you determine that the plaintiffs are entitled to recover damages from the defendants, you should then determine from the evidence the value of the personal property of the plaintiffs, if any, which was wholly destroyed, and in doing that take its market value in Albuquerque at the time, not at retail in the business of the plaintiffs, but the cost to them as apothecaries, to replace the goods destroyed in their stock in Albuquerque, and in determining the damage to plaintiffs, if you find there was any from injury to goods which were not wholly destroyed or lost, you should take the difference, if you can determine it from the evidence, between the market value before the injury of such goods in Albuquerque, as already explained to you and their value determined in the same way after they were injured."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

LXXXIV.

The district court erred in giving to the jury Paragraph Twenty of the charge:

"You are instructed that if you find the plaintiffs are entitled to any damages, you may take into consideration, if you think fit, the length of time which has elapsed since the damage occurred, and,

if you think fit, give damages in the nature of interest over and above the property damage actually suffered by the plaintiffs."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

LXXXV.

The district court erred in giving to the jury Paragraph Twenty-seven of the charge:

"You will have with you two forms for a verdict, by one of which you will find for the defendants, and, by the other, for the plaintiffs. In the latter will be a space for the amount of damages you may assess."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

LXXXVI.

The district court erred in refusing to instruct the jury to find the issues for Barnett."

986 "The defendant Barnett asks the court to instruct the jury to find the issues for the defendants."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

LXXXVII.

The district court erred in refusing to instruct the jury as follows:

"The court instructs the jury that if they believe from the evidence that the wall of the building occupied by the plaintiffs fell because of any inherent defects in the wall itself, or because of the caving of lot number two, in block sixteen, they should find the issues for the defendants, notwithstanding they may believe from the evidence that such caving of lot number two, in block sixteen, was occasioned by excavations made on lot number one, in block sixteen, which excavations deprived lot number two of the lateral support heretofore furnished to it by lot number one prior to the excavation."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

LXXXVIII.

The district court erred in refusing to instruct the jury as follows:

"The court instructs the jury that before the plaintiffs can recover in this action, they must satisfy the jury by a preponderance of the evidence that some of the injuries alleged in the complaint were occasioned by some wrongful act committed by the defendants, and it is not sufficient that the plaintiffs shall by evidence make it appear that some act of the defendants might have caused such injury, but on the contrary, the jury must be satisfied by a preponder-

ance of the evidence that some act of the defendants did cause such injury or the plaintiffs cannot recover."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

LXXXIX.

The district court erred in refusing to instruct the jury as follows:

"The court instructs the jury that there is no presumption that the wall of the building in question fell because of anything done by the defendants, or either of them, and before the plaintiffs can recover in this case they must satisfy the jury by a preponderance of the evidence that the injuries alleged in the complaint were in fact occasioned by some wrongful act committed by the defendants, and not merely that they might have been so occasioned."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

987 XC.

The district court erred in refusing to instruct the jury as follows:

"The court instructs the jury that the owner of a building lot in Albuquerque, such as the lots referred to in the evidence in this case, owes no duty to the owner of an adjoining lot to furnish support for any building or structure which may be erected or standing on such adjoining lot, but it is the duty of every such owner to see to it, at his peril, that the foundations and walls of his structure are of a strength and stability sufficient to sustain themselves without lateral assistance from adjoining property."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XCI.

The district court erred in refusing to instruct the jury as follows:

"The court instructs the jury that the defendant Barnett was not a party or privy to any contract between the plaintiffs and the defendant Weinman in relation to the building and structure mentioned and described in the lease in evidence; that this is not a suit for the recovery of damages growing out of the breach of any contract rights of the plaintiffs, but is a suit for wrongs alleged to have been done by the defendants to the plaintiffs."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XCII.

The district court erred in refusing to instruct the jury as follows:

"The court instructs the jury that if they believe from the evidence that the defendant Barnett employed a competent architect to prepare plans and specifications for the construction of a building on lot number one in block sixteen, of the original townsite of Albuquerque, and if the jury further believe from the evidence that the said defendant Barnett employed a competent person to erect a building and make excavations in accordance with the said plans and specifications, and if the jury further believe from the evidence that it was practicable to so erect and construct the said building in accordance to the said plans and specifications without injury to the plaintiffs in this case, then the plaintiffs cannot recover from the defendants, even though the contractor employed by the said defendant Barnett in the execution of his contract, committed some act which amounted to a trespass upon the rights of the plaintiffs, but the remedy of the plaintiffs, if any, for such trespass, is against the contractor and not against the defendants in this case.

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

988 XCIII.

The district court erred in refusing to instruct the jury as follows:

"The court instructs the jury that they are not bound to accept as true the testimony of the plaintiff, B. Ruppe, as to the quantity or value of the property lost or destroyed or injured by reason of the fall of the wall of said building, as testified to by the witnesses, but it is the duty of the jury to determine the amount and extent of the loss of the plaintiffs, if any, from all of the evidence in the case and from their general knowledge of human affairs, and if the jury believe from the evidence that the plaintiff B. Ruppe has suppressed any fact in connection with the value or quantity of goods lost, or has attempted to exaggerate in any manner the extent of his loss, they have the right to take such fact into consideration in determining the extent of the plaintiff's damages. In no event can the plaintiffs recover in this case a sum in excess of the actual damages suffered and sustained by them, which damage must be directly attributable to some wrongful act on the part of the defendants, and before the plaintiffs can recover any damages against the defendants they must satisfy the jury by a preponderance of the evidence that such damages were occasioned by some wrong on the part of the defendants. It is not sufficient that they shall show that some wrongful act on the part of the defendants might have occasioned the damages."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XCIV.

The district court erred in refusing to instruct the jury as follows:

"The court instructs the jury that in assessing the plaintiffs' dam-

ages they can allow nothing for the injury to goods by reason of their being rendered unsalable, as testified to by the witness Ruppe, because there is no legal evidence of such damages, and the statement by said witness that such damage amounted to the sum of five hundred dollars is insufficient in law to warrant a finding by the jury that any such damage was so suffered."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XCV.

The district court erred in refusing to instruct the jury as follows:

"The court instructs the jury that if they believe from the evidence that the plaintiffs, or either of them, with full knowledge of the terms of the party wall agreement, encouraged the defendants to proceed with the execution of the said agreement, and did not object to the excavation being made on lot number two, in pursuance of the said agreement, then and in that case the plain-
989 tiffs are estopped to claim that such excavation on lot number two by the defendants, if made, was a trespass upon their rights as tenants of the said lot."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XCVI.

The district court erred in refusing to instruct the jury as follows:

"The court further instructs the jury that the plaintiffs claim damages from the defendants for injury to and destruction of personal property, and for an injury to their estate in lot number two, in block sixteen, of the original townsite of Albuquerque, described in the complaint, that the estate of the plaintiffs in the said lot number two, in block sixteen, was an estate for years subject to be terminated by default in payment of the rent reserved by the terms of said lease; that it is admitted by the pleadings that the plaintiffs failed to pay an installment of the rent reserved at the time when the same became due, and the defendant Weinman by reason of such default in the payment of said rent became entitled to re-enter and take possession of the said premises; that the plaintiffs can recover from the defendants, if at all, no damages to their interest in the said real estate which accrued subsequent to the termination of their estate therein as defined in this instruction."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XCVII.

The district court erred in refusing to instruct the jury as follows:

"The court instructs the jury that while the owner of the fee in real estate is entitled to dominion over the same from the dome of the heavens to the center of the earth, the right of the tenant for

years is not necessarily coextensive with that of the owner of the fee, but the right of such tenant, unless expressly enlarged by the terms of the grant, is limited to the use and occupation of the demised premises in the condition in which they are at the time possession is received, and in this case a lateral excavation below the surface of the earth, extending a short distance below the property line between lot number one and lot number two, if any such excavation was made, was not necessarily a trespass upon the rights of the plaintiffs, and the plaintiffs cannot recover in this action for any such excavation, even if the jury shall believe that such excavation was made, unless they shall satisfy the jury by a preponderance of the evidence that such excavation was the proximate cause of the destruction of the wall of the building occupied by the plaintiffs."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XCVIII.

The district court erred in refusing to instruct the jury as 000 follows:

"The court instructs the jury that the plaintiffs, under the lease offered in evidence by them, were bound to pay rent for the premises described therein, notwithstanding the destruction of the building upon the said premises by the wrongful act of the defendants or their employees; that a refusal of the plaintiffs to pay such rent, when the same by the terms of the lease became due and payable authorized the defendant Weinman to re-enter and take possession of the said premises without process of law, and the estate of the said plaintiffs in the said premises became and was terminated by said re-entry for the non-payment of rent, which non-payment of rent is admitted by the pleadings in this case."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous

XCIX.

The district court erred in refusing to instruct the jury as follows:

"The court instructs the jury that there was no evidence in this case that it was necessary for the plaintiffs to remove to the premises to which they did remove, or that such premises were at the time of removal suitable for the business which the plaintiffs proposed to carry on therein, or that plaintiffs might not have obtained other premises more suitable for their purposes and where their business would have been more profitable, and there is no evidence that the plaintiffs made any effort to find premises where they could carry on their business with the same profit as had been made in the Ruppe building, and there is no evidence that suitable premises might not have been obtained in the immediate vicinity of the place where plaintiffs had previously carried on business, and therefore the jury should disregard all evidence as to the loss of profits by the plaintiffs in this case."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

C.

The district court erred in refusing to instruct the jury as follows:

"The court instructs the jury that this is an action of tort in which the plaintiffs seek to recover damages for loss and damages to certain goods, wares and merchandise, as well as damages to loss of profits, which the plaintiffs claim they would have made but for the wrong of the defendants. You are instructed that if you find for the plaintiffs, you may, if you see fit to do so, give damages in the nature of interest over and above the value of the goods at the time of the injury, but you are not bound to do so and you are not at liberty to award to the plaintiffs interest to any other extent or on any other account."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

991 CI.

The district court erred in refusing to accept the verdict of the jury as first returned into court, and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

CII.

The district court erred in instructing the jury before their retirement after first presenting their verdict, as follows:

"GENTLEMEN: If by the verdict you have brought in assessing the plaintiffs' damages against the defendants at five thousand dollars with six per cent interest, you mean that something in the nature of interest up to the present time be added to the sum of five thousand dollars you name, you shall yourselves determine the amount, under the instructions given you, and it will be the better way to add to it whatever other sum you may find, so as to make one total. The court has no right to make the computation or determination for you. If it is not your intention to add anything in the nature of interest up to the present time, to said sum of five thousand dollars, you should make your meaning clear by your verdict.

Another blank form for a verdict will be furnished you to be filled out and returned as you have been instructed.

Following which instructions the court:

The COURT (to jury): I will add if there is anything about the law of the matter which you do not understand, you may ask the Court for further instructions."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

CIII.

The district court erred in overruling the following objection:

"To which remark of the court the defendants except. The defendants, Weinman and Barnett, each for himself excepts to the action of the court refusing to receive the verdict heretofore rendered by the jury as rendered by them and to the action of the court in

returning the jury to the jury room for further deliberation, on the ground that the court has no power to do so. The defendants, Jacob Weinman and Joseph Barnett object to the giving of this instruction by the court, or any other instruction at this time for the reason that the general verdict returned by this jury is plain and does not require any explanation and should be received by the court as it stands; for the further reason that there is no authority of law for the court giving the jury any instructions at this time; the instructions formerly given by the court on his own motion with reference to what the jury might do in finding damages in the nature of interest having been plain and requiring no explanation, and for the further reason that the court has no power or authority to do anything but to accept and receive the verdict as rendered by the jury."

992 And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

CIV.

The district court erred in receiving the second verdict of the jury and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

CV.

The district court erred in refusing to send up for examination by the Supreme Court of New Mexico original exhibits "I," "L," "M," "N-1" to "N-5" inclusive, and "O-1" and "O-2", it being impracticable to incorporate them in the Bill of Exceptions, and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

CVI.

The Supreme Court of New Mexico erred in refusing to consider on the review of this case the original exhibits which had been theretofore brought into that court by certiorari for such use, it affirmatively appearing from the language of the opinion:

"Complaint is made by defendants on account of the refusal of the trial judge to send up to this court some of the books offered in evidence. If these books would have aided us in determining this cause they should be here and the defendants should have taken such steps as the law provides for having them sent up,"

that such exhibits were not considered or examined by the said Supreme Court of New Mexico, although properly before that court for examination.

CVII.

The Supreme Court of New Mexico erred in ruling that exhibits "I," "L," "M," "N-1" to "N-5" inclusive, and "O-1" and "O-2", as used in the district court of Bernalillo County upon the trial of said cause, were not properly before the said Supreme Court for consideration on the said review.

CVIII.

The Supreme Court of New Mexico erred in modifying the judgment of the district court of Bernalillo County by requiring defendants in error to remit only the sum of $770.00, and not re-
993 quiring the said defendants in error to remit all damages allowed by the jury for loss of profits.

CIX.

The Supreme Court of New Mexico erred in awarding to the defendants in error interest on the amount of $6,968.00 from the ninth day of April, 1910, after having modified and reduced the judgment of the defendants in error as recovered in the court below by the sum of $770.00.

CX.

The Supreme Court of New Mexico erred in affirming and in not reversing the judgment of the district court of Bernalillo County.

Wherefore the said plaintiffs in error pray that the said record and proceedings may be seen and examined by this honorable Court, that the errors therein may be corrected and these plaintiffs in error be restored to all things which they have lost by reason of the erroneous judgment of said Court.

(Signed) NEILL B. FIELD,
Attorney for Plaintiffs in Error.

994 And Heretofore, on to-wit on the twenty-sixth day of August, A. D., 1911, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an opinion by the court in the above entitled cause, which said opinion by the court was and is in the following words and figures to-wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1911.

No. 1358.

RICHARD DI PALMA et al., Appellees,
vs.
J. A. WEINMAN et al., Appellants.

Appeal from District Court, Bernalillo County.

Syllabus.

(By the COURT:)

I. Plaintiff, lessees of defendant Weinman, were compelled, by the tortous acts of defendants, to abandon Weinman's building in which they were carrying on a retail drug trade, and for the remainder of the term of their lease continued their business in less

desirable locations. They proved a loss in average daily, weekly and monthly sales, that their percentage of profits was 40% on gross sales and the monthly expenses of carrying on the business in each place;

Held that where damages are claimed for loss of sales of goods, it was not necessary for claimants to introduce evidence as to (*a*) the amount of stock they carried, (*b*) the accounts of the individual partners, (*c*) the amount of capital invested or (*d*) to produce books from which a bookkeeper could ascertain the percentage of profits realized from the business.

II. The plaintiffs were damaged by being deprived of an opportunity to sell goods, their loss was the net profits they would have made on such sales; Held that it was immaterial whether plaintiffs' business was on the whole profitable or unprofitable.

III. One of the plaintiffs testified that he had been a pharmacist for thirty-five years, for over thirty years had been engaged
995 in that profession in Albuquerque and that plaintiffs had been in the retail drug business for sixteen years and that he knew how much gross profits plaintiffs made on the goods they sold; Held that the witness was competent to testify what the gross profits of the business were.

IV. One of the plaintiffs testified, as to the monthly expenses of the business, that they kept no account of the expenses, but that he could state the same from memory; Held, that in the absence of any record of the items of expense, the witness was competent to state from memory the expenses of the business.

V. Plaintiffs introduced in evidence a cash book containing an account of their monthly cash receipts during the term of the Weinman lease, and one of the plaintiffs' cash sales. It was insisted by defendants that the book was not competent, because plaintiffs had been in business in Albuquerque for a number of years before they leased the Weinman building and the receipts included collections for sales made by plaintiffs prior to their occupancy of the Weinman building; Held that this fact did not destroy the evidentiary value of the book, for the reason that if the receipts during the occupancy of the Weinman building were increased by an unknown amount and the receipts thereafter until the end of the term of the Weinman lease were increased by a like amount, the difference, the object of the inquiry, would not be affected.

VI. The defendants insist that the plaintiffs should not have been allowed to put in the testimony they did as to loss of profits, because it appeared that the plaintiff, Ruppe, after the cause of action had accrued, voluntarily destroyed plaintiffs' invoices, check books, cancelled checks and bank pass book. The evidence examined and Held that no error was committed, because the destruction of the invoices, etc., was compatible with good faith on the part of plaintiffs.

VII. The plaintiff, Ruppe, over the objection of defendants were permitted to testify as to the relative desirability for trade purposes of the Weinman building and the locations to which plaintiffs
996 removed; Held that the witness's use and occupation of the buildings qualified him to testify, Following Union Pacific

Ry. v. Lucas 136 Fed. 374; 69 C. C. A. 218 and that the question as to whether the witness was qualified to give his opinion was for the trial judge to determine and his decision, not being clearly erroneous as a matter of law, will not be disturbed. Following, Stilwell & B. Mfg. Co. v. Phelps 130 U. S. 520.

VIII. Plaintiffs were permitted, over objection of defendants, to ask a witness if he had not, prior to the commencement of the excavation which caused the plaintiffs' damage, drawn plans for a building to cover Weinman's lot. Though the answer of the witness was favorable to defendants, they complain that the court committed error in allowing the question to be asked, because it showed a deliberate purpose on the part of the plaintiffs to injure defendants by showing that they caused the damage intentionally; Held no error was committed, because (*a*) even if the question was improper, it was rendered harmless by the witness's answer, and (*b*) the verdict does not show that the jury gave plaintiffs a verdict for compensatory damages only.

IX. Special questions were put to the jury and the answer made to them were inconsistent; Held that where special findings are inconsistent, they neutralize each other and the general verdict controls.

X. The jury brought in a verdict in favor of plaintiffs and assessing "their damages at five thousand dollars, at six per cent interest:" Held that the verdict was ambiguous and that the court committed no error in ordering the jury to retire and bring in another verdict.

XI. The instruction of the court to the jury upon their bringing in an ambiguous verdict examined and Held not to have invited the jury to add to their verdict.

XII. Defendants complain of the refusal of the trial judge to send up the books introduced in evidence. Held that the defend-
997 ants should have taken such steps as the law provides for having the books sent up.

XIII. The proof offered by plaintiffs of loss on account of damage to goods, is no stronger than that offered at the previous trial and should have been excluded. 15 N. M. 68; 103 Pac. 789.

Statement of Facts.

The appellees, hereinafter styled the plaintiffs, brought this suit against the appellants, hereinafter styled the defendants, to recover Ten Thousand Dollars as damages on account of the falling of a wall and the consequent destruction of part of plaintiff's stock of drugs and merchandise and their enforced removal to another building; from a judgment of $7,738.00 based on the verdict for that amount by a jury the defendants bring this appeal.

Opinion of the Court.

MECHEM, *J.*:

This is the third time this case has been before this court Di Palma v. Weinman 13 N. M. 226; 82 Pac. 360; 103 Pac. 782, 15 N. M. 68.

The case was reversed the last time because of a lack of evidence to prove loss of net profits, loss on damaged goods and for an erroneous instruction as to interest. 103 Pac. 782; 15 N. M. 68.

1. On the question of lack of evidence to establish loss of profits this court said:

"There is, however, no evidence of loss of profits, except the bald statement of the witness, Ruppe, as to the net profits per month during the time he occupied the Weinman building premises, and at the location to which he removed his stock after the wall fell. True, the record shows that he referred to some memoranda to refresh his memory; but it nowhere appears what the memorandum was, nor when or by whom it was made, nor does he state that he knows, or even believes, it to be correct. This being true, it was error to submit the question of loss of profits to the jury, there being no sufficient evidence to sustain a verdict for such loss."

998 At the trial from which this appeal is taken, the witness Ruppe produced a cash book, several day books, a soda fountain book and a ledger kept by plaintiffs in the regular course of their business, and from these books, and especially from the cash book, the plaintiff Ruppe stated what were the cash receipts of the business of plaintiffs, for the six and one-half months they occupied the Weinman building, and for the remainder of the term of their lease from Weinman, in the locations to which they were compelled to move. The witness Ruppe testified that he had been a pharmacist for thirty-five years and for over thirty years had been engaged in that profession in Albuquerque and that he and Di Palma had been partners in the retail drug business there, since 1894. In reply to a question as to what his gross profits on sales in the retail drug business had been, he said: "A good many of the medicines came with the price marked thereon; others we figured the cost and what they were worth at retail is marked thereon; prescriptions are compounded and the profit is figured on the drugs and the time used in preparing the same. Certain goods such as sundries and articles of luxury are generally figured at a percentage ranging from fifty to one hundred per cent; prescription compounding must bring more than one hundred per cent; patent medecine profit range all the way from 25 to 35 per cent; in my experience as a druggist, in figuring profits that I have made in my business I figure that my business produced me on the average of 40 per cent. gross."

As to the monthly expenses of the business, the witness testified that plaintiffs' expenses were $434.00 per month. This he stated from memory and on cross-examination said that he had no record of any kind of the monthly expenses, but could and did state the same from memory solely.

The defendants claim that these books, for various reasons, furnish no basis for an intelligent estimate, of profits derived from the business and cannot possibly corroborate the testimony of the witness. Their reasons are (*a*) the books contain no stock account;

999 (*b*) they contain no account of Richard Di Palma and B. Ruppe as partners; (*c*) they contain no showing of the

amount of capital invested; (*d*) they contain no account from which a book-keeper could ascertain the per cent of profits realized; (*e*) or how much merchandise was bought; (*f*) nor what the expense of conducting the business was.

2. It would seem that with respect to a case of this kind, where the injury sought to be compensated was a loss of profits, which followed from but one fact, i. e. diminution of the sales of a retail merchant, that it was first in order, to show that there was such diminution in sales. In this case such diminution was established beyond a doubt. Then the next question presenting itself was what profit did the merchant lose because of such diminution in sales; that is, net profits?

In the case of Foster v. Goddard, 9 Fed. Cas. 4,970 it was said: "Net profits may be defined to be the gain made by the merchant in buying and selling goods, after paying all costs and charges for transacting his business."

If plaintiffs' sales in the Weinman building amounted to so much per month, and they made a profit of 40 per cent. on the amount of such sales, and their monthly expenses of conducting their business amounted to so much, from these facts the amount of net profit would be a mere matter of calculation; and if after the plaintiffs removed from the Weinman Building, their average monthly sales were shown to be so much. On which their profits were 40 per cent. and their monthly expense of conducting the business was shown to be so much, then their monthly net profit in the Weinman building exceeding that resulting from carrying on the same business in the other buildings, such difference multiplied by the number of months remaining in the lease with Weinman would give the loss of net profits suffered by plaintiffs, for which they sue. The factors necessary to be established were amount of sales, gross profits on sales and expense of carrying on the business. These being established by competent evidence, the jury could estimate with
1000 reasonable certainty what *what* loss, if any, was suffered by plaintiffs. It follows then that the amount of Capital invested, the amount of stock on hand or invoice of stock purchased during the period, or the account between the individual partners or the ledger accounts from which a bookkeeper might have drawn a statement of the condition of the firm, though they might have been of some aid, yet were not so necessary that without them, the matter to be established could not be shown by other competent evidence.

In the case of Shepard v. Milwaukee Gas Light Company, 15 Wis. 349, 82 Am. Dec. 679, on the point of how damages on account of loss of profits should be estimated, it is said:

"And it seems to me that the profits of an established business are quite as capable of being ascertained with reasonable certainty as the profits to arise from a single contract or adventure. There is, in the case of such business, the experience of the past to serve as a test. And the rule suggested by Jervis, V. J. in Flecher v. Tayleur, 83 Eng. L. & Eq. 187, that the damages should be estimated 'according

to the average percentage of mercantile profits,' could readily be applied and would seem just and reasonable."

And the court in the same case speaking further on the same point, said:

"It is well established that an action exists in many cases for an injury to a person's trade. Actions for slandering one in his trade or profession are of this character; and the damages are based upon the assumption that such slander injuries the party's business by diminishing it. But how does that damage him? Clearly, only by depriving him of the profits he would have made by the business, of which he had been wrongfully deprived. So also of private actions for a nuisance, the only injury being a diminution of the plaintiff's business. * * * In Marquart v. La Farge, 5 Duer, 559, the defendant had wrongfully broken up the plaintiff's business in a restaurant. The plaintiff gave evidence of the extent of his business, and that 'one half of the receipts were profits.' The court held the evidence admissible. It said: 'Now, it was certainly
1001 competent to prove in some way, the nature and extent of the injury and the value of the business was a proper subject of estimate for the jury.' They then said: 'It may be that a calculation of possible or probable profits, in view of the ordinary uncertainties of business, would not be allowable.' If by this the court meant to exclude all consideration of the profits that would have resulted to the plaintiff according to the ordinary course of his business, it seems to me repugnant to what had previously been expressly allowed. They had allowed evidence of what the profits had been; they had said that the jury must estimate the value of the business,' in arriving at the amount of damages. Not I think it is possible for any judge or jury to do this without considering the profits of that business."

For the purposes of this case, only it may be said that the plaintiffs being damaged solely by being deprived of an opportunity to sell goods, they were then damaged to the extent of the net profits they would have made on the lost sales; therefore, it was immaterial whether on the whole venture plaintiffs were making money or not, for suppose they were, on account of a large stock of shelf worn goods or more capital invested than necessary, or because they were operating to such an extent on borrowed money, making but a small margin of ultimate gain, yet surely they were damaged to the full amount of their net profits on the sales they lost by defendants' trespass. If by reason of any of the causes above stated plaintiffs were conducting the business on the whole at an actual loss, could defendants be heard to say:

"True, by our tortious acts we have caused you to lose sales of goods, on which goods you would have made a profit, but because your business was an unprofitable one you have not been damaged."

All that was required in this case was to prove profits for a few months anterior to the destruction of the building, and for the remainder of the term of the lease with Weinman with reasonable certainty. *Lo*3 Pac. 782. The witnesses' testimony from the books

was competent and admissible and, if the jury believed it,
1002 sufficient to sustain the verdict.

In his brief filed in this case the last time it was before this court, 103 Pac. 782; 15 N. M. 68, the eminent counsel for the defendant Barnett criticized the evidence at that trial as follows:

"The witness Ruppe, who was the only witness as to damages, was allowed to state * * * what were the net profits of the business, without showing the amount of daily, weekly or monthly sales, in the building before the accident, or the amount of like sales in the building to which they removed or what percentage of profit was usual in the trade, or indeed any tangible fact which defendants could, by any possibility disprove."

This view was adopted by the court and plaintiffs have, in our opinion met this criticism, by showing their daily and monthly sales both before and after their enforced removal, the percentage of profits they made in that trade and many tangible facts which the defendants might, if untrue, have disproved.

The case of Central Coal & Coke Co. v. Hartman, 11 Fed. 96-102; 49 C. C. A. 244 is not in point here because the testimony in that case consisted of the unsupported, naked statement of a witness about a transaction, without producing any letters, books, checks or other date to support it and for that reason the court held that such testimony ought not to be the foundation of a judgment in a case where the parties had books, letters, etc. 117 Fed. 540, Edwards v. Bates Co.

Neither is the case of the Conqueror, 166 U. S. 116—41 L. Ed. 937, in point. It did not turn on the competency of the evidence offered, opinions of witnesses as to the loss of profits, but on the weight of the evidence. The court says of the witnesses' testimony that: "Their testimony falls far short of establishing such a case of loss of profits as entitled the libelant to recover this large sum for the detention of his yacht." And also in that case it was shown that the yatch- in question was purchased by her owner for his own pleasure and that there was no definite evidence tending to show that
1003 he bought her for hire or would have leased her if he had been able to do so for any sum.

3. As to the objection that there was no record of the expenses of the business, it may be said, we think, that such items being regular in occurrance, more or less certain in amount and when sworn to so easily tested upon cross-examination, as to the items contained in amount testified to, that the witness Ruppe could well state the total amount and that it was competent. To hold otherwise could be tantamount to saying that the failure of a merchant under such circumctances to keep a regular set of books would deprive him of a remedy that the law gave him.

4. As to the objection to the evidence as to the gross profits; the witness did not testify as to an opinion, but as to a fact within his knowledge, i. e., that the goods sold by the firm were sold at an advance of 40% above their costs. His evidence was admissible and

competent and it was for the jury to say what weight was to be given it.

5. It is also insisted that the monthly cash receipts as shown in the cash book in evidence and from which the plaintiff, Ruppe, was allowed to state the amount of cash sales, cannot throw any light upon the profits during this period, because the record shows that plaintiffs were in the drug business in Albuquerque for many years before they ever entered into a lease with Weinman and how much of the gross receipts during the period to which Ruppe testified were for accounts collected on sales made prior to their entering into the Weinman lease nowhere appears. Admitting this statement to be true, yet it does not destroy the evidentiary value of the book, because of the amount of the monthly net profits before and after the plaintiffs left the Weinman building, would be the same, if we admit that during the occupancy of the Weinman building, of the cash receipts an unknown per cent was for sales made prior thereto, we are compelled to make the same admission with regard to the period after plaintiffs left the Weinman building. The net profits in each case being swelled the same per cent, the difference, the object of this
1004 inquiry, is unaffected.

6. The defendants insist that the plaintiffs should not have been allowed to put in the testimony they did, as to loss of profits, because it appeared that the witness Ruppe, after the cause of action had accrued, voluntarily destroyed plaintiff's invoices, check book, cancelled checks and bank pass book. This cause of action accrued June 30th, 1902; the complaint was filed August 26th 1902, and this case has been before the trial court for hearing four times and before this court three times, and this last hearing was more than eight years after the suit was brought. The witness Ruppe testified that he did not know when the invoices, etc., were destroyed, or by whom, but admits that they were destroyed by his order, but that he never knew that they would be required in the case. The question was then for the judge to determine whether such destruction was compatible with good faith on the part of the plaintiffs. Ruppe said that it was his custom as invoices, checks, etc.. accumulated to have them destroyed to get them out of the *awy*. Prof. Wigmore thus states the rule:

"The view now generally accepted is that (1) a destruction in the ordinary course of busines-, and, of course, a destruction by mistake is sufficient to allow the contents to be shown as in other cases of loss, and that (2) a destruction otherwise will equally suffice, provided the proponent first removes to the satisfaction of the judge, any reasonable suspicion of fraud." 2 Wigmore E-idence, Sec. 1198.

The case of Sturgis v. Clough. 1 Wall, 269, is not in point because in that case the "libellant withheld the best evidence of his profits made by his boat, which would be found in his own books, showing his receipts and expenditures before the collision."

7. Counsel for the defendants assign error to the admission by the trial court, of the testimony of the witness Ruppe, as to the relative desirability of the places to which the plaintiffs moved, as compared

to the Weinman building. They say that such testimony
1005 was clearly opinion and should have been excluded. Admitting that such testimony was purely opinion, yet we will think the evidence was admissible, in view of the fact that the witness had lived in Albuquerque thirty years, during which time he was employed in, or conducted a drug store; that he and Di Palma had been in business since 1894 in Albuquerque, or for a period of sixteen years at the date of the trial, and that he had occupied all three of the locations. Surely, if the rule, which requires those who testify as to the value of real estate, to qualify themselves by proof of knowledge of market *b*alue, derived from sales and purchases, does not apply to the owner of lands who has purchased and used them himself, because his purchase, his ownership and his use qualify him to give an estimate (Union Pac. Ry. v. Lucas, 136 Fed. 374; 69 C. C. A. 218), the witness Ruppe was *w*ualified to give an estimate of the relative desirability of the locations in question.

In any event, the question as to whether the witness Ruppe was qualified to give his opinion was for the trial Judge to determine and his decision, not Being clearly erroneous as a matter of law, will not be di rbed. Stilwell & B. Mfg. Co. v. Phelps, 130 U. S. 520.

8. The plaintiffs were permitted, over objection, to interrogate the witness La Driere as to whether he had, prior to the commencement of the excavation, drawn plans of a building for Barnett which was intended to cover both lots. Though the answer of the witness was favorable to the defendants, they complain that even in allowing the question to be propounded, the court committed error, because it showed a deliberate purpose, on the part of the plaintiffs, to create in the minds of the jury, the impression that, even before the party wall agreement was made, the defendants contemplated the construction of a building on both these lots, and thus to induce them to infer that defendants, at that time, contemplated the destruction of the building occupied by plaintiffs, and therefore such destruction was malicious.

1006 For the reasons (*a*) that the question, even if improper, was rendered harmless by an answer favorable to the defendants, and because (*b*) the verdict does not show that the jury gave plaintiffs a verdict for compensatory damage only, this assignment of error is held to be bad.

9. The following special questions were put to the jury and answered as follows:

No. 1. "Did the plaintiffs have reasonable grounds for apprehension that the wall of the building occupied by them might fall as the result of the excavation being made on Lot 1?" A. "No, sir."

No. 2. "Could the plaintiffs by the use of means reasonably within their reach have protected themselves from damage by the falling of the wall of the building occupied by them?" A. "No, sir."

No. 3. "What, if anything, did the plaintiffs do towards protecting themselves from loss or damage to their property by the falling of the wall of the building occupied by them?" A. "No, sir."

No. 4. "Ought the plaintiffs as reasonable men have anticipated

the fall of the wall of the building occupied by them?" A. "Yes, sir."

While when special findings of facts are inconsistent with the general verdict in a case, the former shall control the latter as provided by Sec. 2993, C. L. 1897; yet where the special findings are themselves antagonistic as in this case, they neutralize each other and the general verdict controls. 2 Thompson on Trials Sec. 2692.

X. After retiring the jury brought in the following verdict:

"We the jury find the issues for the plaintiffs and assess their damages at five thousand dollars at six per cent interest."

The plaintiffs objected to this verdict and the court gave the following instruction:

"GENTLEMEN: If by the verdict you have brought in, assessing the plaintiffs' damages against the defendants at five thousand dollars with six per cent. interest you mean that something
1007 in the nature of interest up to the present time be added to the sum of five thousand dollars you name, you shall determine the amount under the instructions given you, and it will be a better way to add it to whatever other sum you may find, so as to make one total. If it is not your intention to add anything in the nature of interest up to the present time to said sum of five thousand dollars, you should make your meaning clear by your verdict. Another blank form for verdict will be furnished you to be filled out and returned as you have been instructed."

After this charge the jury retired and thereafter brought in the following verdict:

"We the jury find the issues for the plaintiffs, and assess their damages at seven thousand seven hundred and 38 dollars in total amount."

It is asserted by defendants, the verdict as originally returned was not ambiguous, but simply showed that the jury found all the damages which plaintiffs suffered would have been five thousand and it was their intention that that sum should thereafter draw six per cent., then the addition of the words "at six per cent. interest" meant nothing, for the judgment would have drawn six per cent. by force of statute. If, however, these words indicated that the jury intended to give the plaintiffs interest on their damages, then they certainly were ambiguous and the plaintiffs had a right then and there to have the verdict rendered certain.

11. The question then is, and it is raised by counsel for defendants, did the court's instruction as above set forth invite the jury to add to their verdict against the defendants? We do not believe the instruction susceptible of any such construction. The verdict as returned included above the sum of five thousand what would amount to about 7.15% on the amount of five thousand dollars from the date of the injury, to the rendition of the verdict.

12. Complaint is made by defendants on account of the refusal of the trial judge to send up to this court some of the books offered in evidence. If these books would have aided us in determin-
1008 ing this cause they should be here and the defendants should have taken steps as the law provides for having them sent up.

13. The proof as to damaged goods, that is, goods not entirely destroyed, should have been excluded, as it is no more competent than at the former hearing in this case. That was for an item of $500.00.

Counsel for defendants have argued other points in their briefs which we do not deem it necessary to discuss, as they have been disposed of by this court in former opinions.

If the plaintiff will file a remitttitur of $700.00, being $500.00 on account of plaintiff's claim of that amount for damaged goods and $270.00 interest thereon, the judgment of the lower court will be affirmed; if not, it will be reversed.

MERRITT C. MECHEM,
Associate Justice.

We Concur:

WILLIAM H. POPE, *C. J.*
JOHN R. McFIE, *A. J.*
FRANK W. PARKER, *A. J.*
E. R. WRIGHT, *A. J.*
CLARENCE J. ROBERTS, *A. J.*

Mr. Justice Abbott, having tried this case below did not participate in this decision.

Remit-itur filed and final judgment of affirmance entered December 5th, 1911.

1009 TERRITORY OF NEW MEXICO,
Supreme Court, ss:

I, Jose D. Sena, Clerk of the Supreme Court of the Territory of New Mexico, do hereby certify that the foregoing one thousand and eight pages contain a full true and perfect copy of the record and proceedings, pleadings and opinion filed in the above entitled cause which is transmitted to the Supreme Court of the United States in accordance with the writ of error hereto attached.

Witness my hand and the seal of the Supreme Court of the Territory of New Mexico this the 9th day of January, 1912.

[Seal Supreme Court, Territory New Mexico.]

JOSÉ D. SENA,
Clerk Supreme Court of New Mexico.

Endorsed on cover: File No. 23,028. New Mexico Territory Supreme Court. Term No. 173. Jacob Weinman and Joseph Barnett, and Ivan Grunsfeld and M. W. Flournoy, their sureties, plaintiffs in error. Richard de Palma and Bernard Ruppe. Filed January 24th, 1912. File No. 23,028.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1913.

JACOB WEINMAN, ET ALS., *Plaintiffs in Error,*

v. No. 173.

RICHARD DE PALMA, ET AL., *Defendants in Error.*

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

This case comes into this court by writ of error to the Supreme Court of the Territory of New Mexico.

It has been four times tried by a jury and three times before the Supreme Court of New Mexico on appeals prosecuted, once by the defendants in error and twice by the plaintiffs in error, Weinman and Barnett.

On the first trial, which took place in 1903, the trial judge directed a verdict in favor of the plaintiffs in error Weinman and Barnett, and that action was reversed by the Supreme Court of New Mexico. The opinion is to be found reported in 13 New Mexico, 226.

On the second trial, which took place in November, 1906, the jury found a verdict in favor of the defendants in error for $4,000, and again the case was reversed by the Supreme Court of New Mexico. The opinion is to be found reported in 15 New Mexico, 68.

On the third trial which took place in December, 1909, the jury disagreed (Trans. 35), and on the fourth trial which took place in April, 1910, a verdict was returned by the jury in favor of the defendants in error in the following form:

> "We, the jury, find the issues for the plaintiffs and assess their damages at Five Thousand Dollars and 6 per cent interest." (Trans. 47.)

This verdict was considered by the court to be ambiguous, additional instructions were given to the jury, over the objection of plaintiffs in error, and the jury then returned a verdict for $7,738.00 (Trans. 48.) Thirteen special questions were submitted to and answered by the jury, and some of these answers were inconsistent with each other. (Trans. 48-50), but the Supreme Court of New Mexico held that these inconsistent answers neutralized each other and the general verdict was not thereby affected. (Trans 535.) The case was again taken on appeal to the Supreme Court of New Mexico, and that court held that error had intervened in the introduction of certain evidence as to damaged goods, and ordered that the judgment

should be reversed unless the defendants in error would remit $770.00 of their judgment, but ordered the modification and affirmance of the judgment if such remittitur were filed within ten days. Within that time remittitur was filed and judgment was rendered against Barnett and Weinman and the sureties on their supersedeas bond, Grunsfeld and Flournoy for $6,968.00, (Trans. 498), and judgment was rendered in favor of Barnett and Weinman for the costs of that appeal.

This is the judgment sought to be reviewed by the present writ of error, and the opinion of the court will be found in the transcript (p. 526) and also reported in 16 New Mexico, 302.

On the second review of this case, the Supreme Court of New Mexico stated the facts in the following language:

> "The appellants Weinman and Barnett were the owners of lots 2 and 1, respectively, of block 16, of the town of Albuquerque, at all times during which the events leading up to the bringing of this action transpired, and in December, 1901, on each lot stood a building with separate walls between, but very close together, and perhaps touching part or all the way where they ran parellel to each other. On December 15, 1901, Weinman leased his building on lot 2 to appellees, who subsequently, up to June 30, 1902, used and occupied it as a retail drug store; the lease running for two years and the rent reserved be-

ing $90 per month, payable monthly in advance. Some time in May or June, 1902, and while the Weinman building was being so occupied by appellees, Barnett took down and removed his building on lot 1, including the wall adjacent to the Weinman building and with a view of erecting a new building on said lot. The east wall of the Weinman building, which was an old adobe wall and had stood for many years, was crooked and bulged and out of plumb, and had been for some time, as shown by the evidence. After the removal of the Barnett building the appellants, Weinman and Barnett, entered into a party wall agreement, whereby Barnett was to be permitted to build a party wall on the line between the two lots; said wall to stand one half its full thickness on each lot and to be 40 inches wide at the bottom or footing course of the foundation and 18 inches wide at the floor joists, first and second story walls to be 13 inches thick, and the fire wall 9 inches thick. It was also specified in said agreement that Barnett should be permitted to take down any part of the east wall of the Weinman building which might be necessary to locate the new wall centrally over the line. The evidence discloses that the appellee Ruppe, who was in charge of the drug store in question, was apprised of this agreement before any steps were taken to carry it into effect and made no objection thereto.

"Barnett excavated a cellar on his lot preparatory to erecting his new building, leaving a bank on the west side, next

to the Weinman building, variously estimated by the witnesses from 2 to 5 feet wide, and on June 30, 1902, had a contractor engaged in the building of the foundation of the new building, including the party wall, as per agreement with Weinman. The contractor, on that day or just prior thereto, had excavated for a space about 5 feet long on the line between the two lots at the northeast corner of the Weinman building, and, according to the testimony of some of the witnesses, extending under the east wall of that building from 10 to 14 inches and of a depth of 7 or 8 feet. At about 5:30 on the afternoon of said day, the east wall, or a portion of it, from a point 55 feet south of the front line and up to the northeast corner, where the excavation just referred to was situated, fell, causing the damages of which appellees complain. It seems pretty well established by the evidence that the first crack of the falling wall appeared 55 feet back from the sidewalk, and that the wall in falling moved slightly to the north or front of the building, and that the stone foundation under the excavation heretofore referred to fell in such excavation, while the foundation of the remaining 50 feet of the fallen wall remained in place. There is considerable conflict in the evidence as to just how the wall fell, and what portion of it fell inside and what portion outside of the Weinman building. There is considerable testimony to the effect that the east wall of the Weinman building was

weak and in an unsafe condition, and to support the appellant's theory that it fell from its inherent weakness and from the removal of the Barnett wall and the excavation on lot 1 depriving it of lateral support.

"Immediately after the falling of the wall the appellees removed to another location what remained of their stock and fixtures, and apparently occupied the same premises up to the time their lease of the Weinman lot and building expired by its terms. Upon demand by Weinman, after the wall fell, for the rent for July, 1912, appellees refused to pay it, and Weinman thereupon took possession and sold his lot to Barnett, who went into possession and occupied it. The appellees brought suit for damages against both Weinman and Barnett, claiming damages in the sum of $10,000—for stock and fixtures injured and destroyed, $3,000; for the value of the unexpired term of the lease, $1,000; for being compelled to remove to a less favorable location, $500; and for loss of profits to their business, $5,500."

Di Palma v. Weinman, 15 *N. M.*, 68, 77-70.

Although the case has been tried twice since that statement of facts by the court, the statement, so far as it goes, fairly sets forth the facts as disclosed by the present record. Of course those questions which were settled by the Supreme Court of New Mexico on the first two appeals were

not open to re-examination in the subsequent trials in the court below, nor in the reviews had.

On the first appeal the Supreme Court determined that the evidence offered by the defendants in error entitled them to go to the jury upon the question as to whether or not the excavation under the northeast corner of lot number two was the proximate cause of the fall of the wall. As two juries have found that the excavation was the proximate cause of the fall of the wall, and a third jury has disagreed upon the point, it would seem that plaintiffs in error are hardly in position to ask this court to reexamine that ruling, or to argue that, as a matter of law, the ruling was erroneous. This is not to be understood as an admission, however, that the charge of the court under which these juries reached this conclusion correctly stated the law for their guidance. On the contrary I shall insist that the charge was erroneous and was so prejudicial to plaintiffs in error that a reversal might be had for that reason alone.

I shall discuss under a proper heading in this brief the errors in the charge of which complaint is made, but deem it unnecessary in this statement of the case to call particular attention to them. On the trial now under review, Mr. Ruppe, who was the only witness on the subject of damages, was permitted to testify that on goods which cost him $400, and which he sold after the accident for $300, he suffered a loss of $500, and the jury was permitted to find, and did find, against the plain-

tiffs in error in accordance with his testimony on that proposition. It is true that the Supreme Court of New Mexico on the last review compelled the defendants in error to remit the amount of this item of damages, but this record justifies the statement that his testimony as to this item is fairly characteristic of all of the testimony with reference to damages. He was permitted to testify that his experience as a druggist enabled him to estimate that his profits averaged forty per cent gross. Over objection he was asked this question:

> "Now, Mr. Ruppe, can you tell us whether or not in your business as a druggist you had any system of selling prices from which you can determine the amount of your receipts from the sale of goods over their cost price to you?" (Trans. 186.)

and answered thus:

> "A good many of the medicines came with the price marked thereon; others we figured the cost, and what they are worth at retail is marked thereon, prescriptions are compounded and the profit is figured on the drugs and the time used in preparing the same. Certain goods such as sundries and articles of luxury are generally figured at a percentage ranging from fifty to one hundred per cent; prescription compounding must bring more than one

hundred per cent, patent medicine profits range all the way from 25 to 35 per cent; in my experience as a druggist, in figuring the profits that I have made in my business I figure that my business produced me an average of 40 per cent gross." (Trans. 187.)

He was permitted to refresh his recollection by the use of the bill of particulars and to practically read the same to the jury as his testimony, although it affirmatively appeared that this bill of particulars was made up in this way:

"Immediately upon moving everything, the goods were separated, or rather, I would say, classified as druggists do on their shelves, and those bottles and goods that were completely destroyed were put into a book by me; and then I commenced checking the stock, using Mr. Malette and Dr. Baltes who were two clerks in my employ, to assist me in endeavoring to remember what we had on the day of the wreck. This was the only way we had of ascertaining what was missing and destroyed." (Trans. 164..)

"Q. You say you were engaged during all the month of July in making up the list of articles that were destroyed?

A. Yes, sir.

Q. Well, did you finish it in July?

A. I do not positively remember when I finished it.

Q. Well, I want to know as near as

you can tell us, Mr. Ruppe, when did you finish that list?

A. I do not remember.

Q. You do not know whether it was July or August or September?

A. No, sir.

Q. Now, do you know whether it was at any time before the order for the bill of particulars was made in this case?

A. I am not positive that it was.

Q. Is it not a fact that you continued to put things on that list from time to time up to the very time of the order for the bill of particulars?

A. I kept adding to the list, but as regarding to being up to the time of the order of the bill of particulars, that I do not remember.

Q. Did you say who assisted you in making up that list?

A. Yes.

Q. Who was it?

A. I stated that I inquired from Mr. Mallette and Dr. Baltes about goods that I missed and that I called their assistance in helping me get up that list.

Q. Now, is it not a fact that for months after you got into the Grant building, so called, whenever your attention was called to any stock that you didn't have and that you thought you had in the Weinman building, that you put that on the list as having been destroyed?

A. No, sir.

Q. Well, you did put on the list the things that you missed, didn't you?

A. Yes, sir.

Q. Whenever you missed them?

A. If I was satisfied, afterinquiry, that they had been in stock at the time of the wreck.

Q. That is, if it was the recollection of Dr. Baltes or of Mr. Mallette that you had such a thing in the stock in the Weinman building and you didn't have it in the Grant building, then you put it down on this list as having been destroyed?

A. And the bills showed it had been purchased recently—and nobody remembered selling it, then I would put it down.

Q. Well, now, let us see if this is right; in the first place, you would have to have a bill of the recent purchase of the stuff?

A. Yes, sir.

Q. In the next place you had to be unable to find it in stock?

A. Yes, sir.

Q. And in the next place you had to have the recollection of either Baltes or Mallette that you had had it in stock in the Weinman building ?

A. Or myself.

Q. And in the next place you would have to have the recollection of, or want of recollection on the part of, Baltes, Mallete or yourself as to its having been sold to anybody, in the Grant building?

A. Yes, sir.

Q. And when those things concurred you put on your list anything that you thought was destroyed?

A. When I felt satisfied it should be in stock, and it was lost, after inquiry, I would put it on the list.

Q. And that for a period of months

after you got into the Weinman building?

A. That I cannot state—how long it was.

Q. You cannot state that it was not so?

A. I know it kept up during the month of July, possibly part of August." (Trans. 254-5.)

He was permitted to offer in evidence books of account which were so incomplete as to constitute, as a matter of law, nothing more than mere self-serving memoranda in writing; which were mutilated and otherwise not free from suspicion of fraud, which did not show the amount of capital invested in the business or the expenses of carrying it on (Trans. 184-5, 188), the amount of merchandise purchased, or any of the data essential to the verification of his statements, and he destroyed after this suit was brought his bank book, check book, checks, invoices and everything of a documentary nature which would have tended to corroborate his statements, if true, and to contradict them if false. (Trans. 182, 214). The trial judge, it is true, examined these books of account and held that they were free from suspicion of fraud (Trans. 205) and the jury was permitted to consider them, but the trial judge refused to certify them up for inspection by the Supreme Court:

"for the reascon that in the opinion of

> the trial judge the appearance and contents of said exhibits was for the consideration of the jury alone and an inspection of the same by the Supreme Court is improper and unnecessary and for that reason alone refused to make such order." (Trans. 456-7.)

The Supreme Court, on application of plaintiffs in error, awarded a *certiorari*, and on that writ the books were brought before that body (Trans. 490-1), but that court did not examine the books and refused to pass upon our assignment of error based upon the refusal of the trial court to send them up, saying in its opinion:

> "Complaint is made by defendants on account of the refusal of the trial judge to send up to this court some of the books offered in evidence. If these books would have aided us in determining this cause they should be here and the defendants should have taken steps as the law provides for having them sent up." (Trans. 535.)

That court, notwithstanding this rebuke to counsel for failure to properly present the case of plaintiffs in error, ordered these books, together with other original exhibits to be sent up for the inspection of this court, and they are now in the custody of the Clerk of this court and will be presented upon the oral argument.

Two statutes of New Mexico bearing upon the

question of the admissibility of these books are as follows:

"Sec. 2647. Any two or more persons in this territory may, and when they shall think proper, bind themselves mutually, for a certain time and under certain conditions, to do and follow at the same time various negotiations on their own common account and risk, or at that of each one of the partners respectively, as well in the losses as in the profits that may arise from said co-partnership."

"Sec. 2650. The company shall keep their books in due form, with an inventory of their stock and capital, keeping an account of all the business they transact: Provided, That no partner shall withdraw from the capital or profits, until the dissolution of the co-partnership, any sum not stipulated in the indenture."

"Sec. 3031. Hereafter in the trial of civil causes in the courts of this territory, the books of account of any merchant, shopkeeper, physician, blacksmith or other person doing a regular business and keeping daily entries thereof, may be admitted in evidence as proof of such accounts upon the following conditions:

First. That he kept no clerk, or else the clerk is dead or inaccessible.

Second. Upon proof, the party's oath being sufficient, that the book tendered is the book of original entries.

Third. Upon proof, by his customers, that he ususally kept correct books.

Fourth. Upon inspection by the court to see if the books are free from any sus-

picion of fraud."

Comp. Laws of New Mexico, 1897.

There are fifty-nine assignments of error based upon the rulings of the trial judge with reference to Mr. Ruppe's testimony, which assignments are rendered necessary, because the theory of counsel for defendants in error seemed to be that plaintiffs in error must respond to any claim for damages, however fanciful or uncertain, the witness was willing to support by his oath, and the court by its ruling supported that theory. I submit to this court two propositions with relation to this branch of the case: First, assuming that the defendants in error were entitled to recover damages, the measure of damages in this case was no different than that applicable to an action by a tenant against his landlord for a breach of the covenant of quiet enjoyment of the lease, which would have been the value of the leasehold estate over the rental agreed to be paid, and such expenses as were necessarily incurred in saving the property, together with the actual depreciation in value of the injured property, excluding gains prevented and loss of anticipated profits, as too remote and uncertain; and, second, that if the court shall hold that gains prevented and loss of anticipated profits were properly a subject of inquiry in the case, the defendants in error wholly failed to support their claim in this regard by any legal

evidence, and that the evidence on the last trial did not, as a matter of law, differ in any degree from that which was condemned by the Supreme Court of New Mexico in its opinion on the second review of the case, when it said:

> "There is, however, no evidence of loss of profits except the bald statement of the witness Ruppee as to the net profits per month during the time he occupied the Weinman premises; and at the location to which he removed his stock after the wall fell; true, the record shows that he referred to some memorandum to refresh his memory, but it nowhere appears what the memorandum was, nor when or by whom it was made; nor does he state that he knows or even believes it to be correct. This being true, it was error to submit the question of loss of profits to the jury, there being no sufficient evidence to sustain a verdict of such loss."
>
> *Di Palma vs. Weinman*, 15 *N. M.* 68, 89-90.

It is true that the Supreme Court of New Mexico, in its last opinion, said:

> "The witness's testimony from the book was competent and admissible and, if the jury believed it, sufficient to sustain the verdict.
>
> In his brief filed in this case the last time it was before this court, 103 Pac.

782; 15 N. M., 68, the eminent counsel for the defendant Barnett criticized the evidence at that trial as follows:

'The witness Ruppe, who was the only witness as to damages, was allowed to state * * * what were the net profits of the business without showing the amount of daily, weekly or monthly sales, in the building before the accident, or the amount of like sales in the building to which they removed or what percentage of profit was usual in the trade, or indeed any tangible fact which defendants could, by any possibility disprove.'

This view was adopted by the court and plaintiffs have, in our opinion, met this criticism, by showing their daily and monthly sales before and after their enforced removal, the percentage of profits they made in that trade and many tangible facts which the defendants might, if untrue, have disproved." (Trans. 531-2.)

But, as I have already shown, that court did not examine the books on which the witness based his testimony, but assumed a failure on the part of counsel properly to present the matter by the record, and therefore gave to this proposition no more than perfunctory consideration. That court ignored entirely the assignment of error based upon the refusal of the trial judge to give to the jury a proper cautionary instruction, with reference to this evidence. (Trans. 521.)

This witness was permitted to express his opinion about various matters as to which opinion evi-

dence is not admissible. For instance, as to the relative availability for business purposes of the three buildings occupied by him during the period in controversy (Trans. 195); as to the business center of Albuquerque (Trans. 194) and as to the condition of trade in Albuquerque during this period. He was further permitted to testify that the ruling rate of interest in Albuquerque was ten per cent (Trans. 196-7), although by statute the rate of interest, in the absence of a contract, is fixed at six per cent. The prejudicial effect of this testimony is shown by the fact that after the jury had returned a verdict for $5,000 with six per cent interest, they retired, over the protest of plaintiffs in error, and increased that verdict by an amount of interest equal to 7.15 per cent for the entire period of time between the date of the injury and the rendition of the verdict.

The statutes relating to interest follow:

> "Sec. 2550. The rate of interest, in the absence of a written contract fixing a different rate, shall be six per cent per annum, in the following cases:
>
> First. On money due by contract.
>
> Second. On judgments and decrees for the payment of money when no other rate is expressed.
>
> Third. On money received to the use of another, and retained without the owner's consent expressed or implied.
>
> Fourth. On money due upon the settlement of matured accounts from the day

the balance is ascertained.

Fifth. On money due upon open account, after six months from the date of the last item."

"Sec. 3219. The jury on the trial of any issue or inquisition of damages may, if they shall think it, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure."

Comp. Laws of New Mexico, 1897.

The propositions of law involved in the case which had been settled contrary to the contention of plaintiffs in error by the Supreme Court of New Mexico prior to the last trial, are saved upon this record and are open to review by this court, notwithstanding the fact that they were foreclosed for the trial court. Such of them as we desire to insist upon will be discussed under appropriate headings; such of them as are not so discussed will be, of course, considered by this court as abandoned.

Plaintiffs in error in this court have filed the following assignment of errors:

ASSIGNMENT OF ERRORS.

I.

The district court erred in permitting the witness La Driere to be examined with reference to having drawn plans for a building to cover both lots one and two prior to the falling of the wall in

question in this case and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 138-9).

II.

The district court erred in admitting in evidence the specifications offered by defendants in error, and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 138-9).

III.

The district court erred in admitting in evidence the party wall agreement, and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 146).

IV.

The district court erred in admitting in evidence the contract, "Exhibit K," and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 148).

V.

The district court erred in admitting in evidence "Exhibit H," foundation plans, and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 142.)

VI.

The district court erred in permitting the de-

fendants in error to give evidence as to their efforts to find a new location, and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 161-2.)

VII.

The district court erred in overruling the objection of plaintiffs in error to the following question:

> "Q. From your experience as a merchant in Albuquerque, as you have given it, do you know how the building—how the store in the Grant building to which you moved, compared as a business location for a drug store with the store—with the building that fell, that you had formerly occupied?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 163).

VIII.

The district court erred in permitting the witness Ruppe to testify that the location of the store in the Grand building was very inferior to the location of the building that fell for purposes of carrying on a drug business, and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 163).

IX.

The district court erred in overruling the objection to the question:

> "Q. What did you say as to whether or not the list as you made it up was correct so far as it went, of the articles that had been destroyed?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 164.)

X.

The district court erred in overruling the objection to the following question:

> "Q. Now, did you make from that book a copy of the memorandum of the goods lost, which was contained in it?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 165).

XI.

The district court erred in permitting counsel for defendants in error persistently to lead the witness Ruppe, and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XII.

The district court erred in permitting the witness Ruppe to refresh his recollection from the bill of particulars, and the Supreme Court of New

Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 166.)

XIII.

The district court erred in overruling the objection to the question:

> "Q. Will you please refer to the bill of particulars that you have mentioned, and refresh your recollection and tell us what articles were destroyed, and their value?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 166.)

XIV.

The district court erred in permitting the defendants in error to give evidence of the expense of removing from the Weinman building to the Grant building, and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 170.)

XV.

The district court erred in permitting the defendants in error to give evidence that the value of the goods damaged immediately before the fall of the wall was $800, and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XVI.

The district court erred in permitting the defendants in error to give evidence that the value of the goods damaged immediately after the fall of the wall and after they were separated was $300.00, and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 176.)

XVII.

The district court erred in permitting defendants in error to give evidence as to the daily cash receipts of their business, and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 177-9.)

XVIII.

The district court erred in overruling the objection:

> "And on behalf of Mr. Barnett I object that: all of it is testimony for the purpose of laying foundation for secondary evidence, and is not competent to go to the jury in any case, and tends to mislead the jury as to what they are called upon to try, and because the question of what may have been done or left undone at any former trial of this case, does not change the rules of evidence."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 183-4.)

XIX.

The district court erred in overruling the objection:

> "I wish to make an objection also, if the court please, on behalf of defendant Barnett, to the introduction of parts of this book now offered, because when it is attempted to prove loss of profits in such a case as this, it is necessary that the parties relying on such evidence shall present at least such a complete set of accounts as will enable a bookkeeper to ascertain the amount of capital employed in the business, the expense of conducting it, its income and profits, from the books themselves, and that it is incompetent to offer anything less than a complete system of accounts of such character as is indicated; and such accounts, when offered, as the basis of proof of loss of profits, cannot be supplemented by oral testimony of estimates of profits; the books and accounts offered in evidence must be reasonably complete in themselves and must appear to have been a reasonably complete set of accounts and not a mutilated set or part of a set, or less than such a set of accounts as is indicated by the objection."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 184-5.)

XX.

The district court erred in overruling the ob-

jection:

> "I object, for the reason that evidence of this character is incompetent for any purpose unless accompanied by similar evidence as to disbursements and such a set of accounts as will enable a bookkeeper to take the accounts and verify the results of the witness's testimony. In other words that it is incompetent to present a part of the set of books and from that to attempt to show receipts without showing also the disbursements in the same way by similiar evidence, so that the question of loss of profits, if any, can be verified."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 185.)

XXI.

The district court erred in overruling the objection to the question:

> "Q. Now, Mr. Ruppe, can you tell us whether or not in your business as a druggist you had any system of selling prices from which you can determine the amount of your receipts from the sale of goods over their cost price to you?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 186.)

XXII.

The district court erred in refusing to strike out the answer:

> "A. A good many of the medicines came with the price marked thereon; others we figured the cost, and what they are worth at retail is marked thereon; prescriptions are compounded and the profit is figured on the drugs and the time used in preparing the same. Certain goods such as sundries and articles of luxury are generally figured at a percentage ranging from fifty to one hundred per cent; prescription compounding must bring more than one hundred per cent., patent medicine profits range all the way from 25 to 35 per cent; in my experience as a druggist, in figuring the profits that I have made in my business I figure that my business produced me an average of forty per cent gross."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 187.)

XXIII.

The district court erred in refusing to strike out the answer:

> "A. My knowledge of the business permits me to state that I make 40 per cent on my sales."

And the Supreme Court of New Mexico erred in

refusing and failing to consider such action of the district court as erroneous. (Tr. 187.)

XXIV.

The district court erred in overruling the objection:

> "I object to that because it is not competent in such an inquiry as this, to show receipts by books and expenditures by testimony but in order to lay a foundation for recovery of loss of profits, there must be such a system of accounts presented as will enable a bookkeeper to take those accounts and, with reasonable certainty, determine the extent of the profits."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 188.)

XXV.

The district court erred in overruling the objection to the question:

> "Q. State, if you can then, Mr. Ruppe, what your monthly expenses were in the operation of that business during the time that you were in the Weinman building."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 189.)

XXVI.

The district court erred in overruling the motion to strike out the answer:

> "A. One-half in December, 1901—$217; January, $434; February, $434; March, $434; April, $434; May, $434; June, $434, making a total expense of $2,821."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 189.)

XXVII.

The district court erred in overruling the objection to the question:

> "Q. Now, can you give us the average daily cash receipts by the month for the period of time in question?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 189.)

XXVIII.

The district court erred in overruling the objection to the question:

> "Q. Do you know what your average daily sales were during that period?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the

district court as erroneous. (Tr. 190.)

XXIX.

The district court erred in overruling the objection to the question:

> "Q. Did you keep in your books a record each day of the total daily sales?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous (Tr. 191.)

XXX.

The district Court erred in overruling the objection to the question:

> "Q. How, then, can you tell us the daily sales or the average daily sales?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 189.)

XXXI.

The district court erred in overruling the motion to strike out the answer:

> "A. By figuring at the end of the month the outstanding accounts due me, and that showed me that my business between cash and creditwas the same on the average."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the

district court as erroneous. (Tr. 189.)

XXXII.

The district court erred in overruling the objection to the question:

> "Q. Do you know what the ordinary rates of interest on money was here in Albuquerque during that time?"

And the Supreme Court of New Mexico erred in refusing and failing to consider suc haction of the district court as erroneous. (Tr. 192.)

XXXIII.

The district court erred in overruling the objection:

> "We make the objection that we did not invite him to go into business at any other place; that what he did in any other place is wholly immaterial, irrelevant and incompetent."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 194.)

XXXIV.

The district court erred in overruling the objection to the question:

> "Q. Now, where was that location with reference to the business center of the city, as you have already described it?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 194.)

XXXV.

The district court erred in overruling the objection to the question:

> "Q. Tell us, what, if any, efforts you made after removing to the Grant building, to find a more favorable location?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 194.)

XXXVI.

The district court erred in overruling the motion to strike out the answer:

> "A. I tried to rent the Barnett corner, the one at present occupied by Mr. Matson. I saw Mr. Lewinson, of the Economist, and tried to rent half of his store."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 194.)

XXXVII.

The district court erred in overruling the objection to the question:

> "Q. Were you able to find, at or prior

> to the time that you removed into the Armijo building, any location nearer to the business center than you have described, as you have described it—than the Armijo building?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 194.)

XXXVIII.

The district court erred in overruling the objection to the question:

> "Q. Do you know, from your experience as a business man in Albuquerque, as you have testified to it, how the stand in the N. T. Armijo building, to which you removed, compared as a business location for the drug business, with the stand in the Grant building?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 195.)

XXXIX.

The district court erred in overruling the objection to the question:

> "Q. And how did the location in the Armijo building compare with the location in the Weinman building?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the

district court as erroneous. (Tr. 195.)

XL.

The district court erred in overruling the motion to strike out the answer:

> "A. The location I occupy at present is inferior to the one I formerly occupied in the Weinman building."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 195.)

XLI.

The district court erred in admitting in evidence receipts in the Armijo building, and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 196.)

XLII.

The district court erred in overruling the objection to the question:

> "Q. Mr. Ruppe, can you tell us how much capital you had invested in your business while you were in the Grant building, in the Armijo building, during the period which you have just testified?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 196.)

XLIII.

The district court erred in overruling the ob-

jection to the question:

> "Q. Do you know what was the rate of interest ordinarily received on moneys during that period; do you know what the ordinary rate of interest was which money was earning in Albuquerque during that period while you were in the Grant building and the Armijo building?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 197.)

XLIV.

The district court erred in overruling the objection:

> "And further, it affirmatively appears from the testimony of the witness that no system of accounts was kept whereby the capital invested in the business, the receipts or expenditures or profits could be reasonably ascertained."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 200.)

XLV.

The district court erred in admitting in evidence five books, and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 200.)

XLVI.

The district court erred in overruling the objection:

> "We make now, the general objection that the book as presented is in a mutilated condition, pages 213 and 214 being obviously cut out, and other, which I will specify when my attention is called to the numbers—otherwise, I will ask an opportunity to look through it now.
>
> Mr. Wood: 181-2-3-4 were also cut out.
>
> Mr. Field: And the further objection that pages 181 to 184, inclusive, have been taken out, and that the book, upon its face, is mutilated by erasures and the marking out of lines, and is otherwise unintelligible; and that all the books offered by the plaintiffs do not comprise a whole system of accounts, as testified to by him; that he has a pass book and check book which were part of this system and which he intentionally destroyed after the rights of the parties to this action became fixed."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 201.)

XLVII.

The district court erred in overruling the motion to strike out the answer:

> "A. I immediately telephoned to Trinidad, Colorado, and after two days

succeeded in locating Father Di Palma, requested him to send them at once, and immediately put them into the safe in Mr. Wood's office."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 207.)

XLVIII.

The district court erred in overruling the motion to strike out the answer:

"A. To show him what cash and medicines were charged to his account."

And the Supreme Court of New Mexico erred in refusing and faiilng to consider such action of the district court as erroneous. (Tr. 207.)

XLIX.

The district court erred in overruling the objection to the question:

"Q. Well, Mr. Ruppe, have you examined this book which you have offered in evidence, for the purpose of determining what, if any, bad debts were incurred by you because of merchandise sold during the period of the Weinman lease?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 215.)

L.

The district court erred in overruling the objection:

> "I wish to make objection on behalf of Defendant Barnett: I join in the objection of the Defendant Weinman and make the further objection that evidence as to the amount of bad debts incurred, without evidence as to the amount of purchase or sales of merchandise, is incompetent and merely tends to mislead the jury, and sheds no light upon the issues in this cause."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 216.)

LI.

The district court erred in overruling the objection to the question:

> "Q. Mr. Ruppe, from your experience as a merchant during the time in question, do you know what the conditions of trade in Albuquerque were for a year and a half subsequent to the fall of the wall?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 217.)

LII.

The district court erred in overruling the ob-

jection to the question:

> "Q. How did it compare with the conditions o ftrade as they existed in Albuquerque during the time you were in the Weinman building?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 217.)

LIII.

The district court erred in overruling the motion to strike out the answer:

> "A. Conditions were getting better."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 218.)

LIV.

The district court erred in overruling the motion to strike out the answer:

> "A. I have not produced them because I was not required to do so."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 243.)

LV.

The district court erred in overruling the motion to strike out the answer:

"A. My answer to that undoubtedly indicates that I referred to the list as made out here by mere."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 247.)

LVI.

The district court erred in overruling the motion to strike out the answer:

"A. Because undoubtedly, the same as I said before, I must have had on my mind in answering that question that list I prepared."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 247.)

LVII.

The district court erred in sustaining the objection to the question:

"Q. Didn't he tell you that they were going to dig under your wall and put a footing in there and put up a straight brick wall which would straighten the wall in your store?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 258.)

LVIII.

The district court erred in sustaining the objection to the question:

> "Q. What, if anything, did you do toward preparing for the possible weakening of that wall, during the process of that excavation?"

And the Supreme Court of New Mexico erred in refusing anl failing to consider such action of the district court as erroneous. (Tr. 262.)

LIX.

The district court erred in overruling the motion to strike out the testimony as follows:

> "The defendant Weinman moves to strike out all the testimony of this witness with reference to the value of the electric piano, for the reason that the witness has shown that all he knows is what he paid for it, which is not the true measure of value; and also moves to strike out the testimony of the witness with reference to the back shelving because it is shown to be based upon hearsay and not upon any knowledge of the witness."

And the Supreme Court of New Mexico erred in refusing anl failing to consider such action of the district court as erroneous. (Tr. 275-6.)

LX.

The district court erred in overruling the motion of the plaintiff in error Barnett:

"On behalf of the defendant, Barnett, I desire to move to strike out certain portions of the testimony: In the first place I desire to move to strike out all of the books of account offered in evidence on behalf of the plaintiffs in this case for the reason that it affirmatively appears that these books of account are not in themselves—do not constitute in themselves a complete system of accounts from which a bookkeeper could ascertain the amount of capital embarked in this business, or the amount of business actually conducted or the profits thereof; that it is impossible to ascertain from these books of account the merchandise purchased and the amount of expense incurred in the conduct of the business, and also that no foundation has been laid for the introduction of them as books of account under the requirements of the statute of this territory in such cases; that by the laws of the Territory of New Mexico, Section 2650 of the Compiled Laws of 1897, and that chapter generally, a partnership is required to keep their books in due form and inventory their stock and actually keep an account of all the business that they transact; that these books do not conform to that requirement; further, that it affirmatively appears that at and before the institution of this suit, and afterwards, plaintiffs had in their possession other evidence of a documentary character, which, taken in connection with the books of account produced here, would have enabled a bookkeeper—or a person familiar with ac-

> counts—to acertain the extent of the business transacted by the plaintiffs, the amount of the profits and expenses—all other necessary data, and it affirmatively appears that that documentary evidence was intentionally destroyed by one of the plaintiffs, Bernard Ruppe, or under his direction."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 283-4.)

LXI.

The district court erred in overruling the motion of the plaintiff in error Barnett:

> "I further move to strike out all of the evidence of the witness, Bernard Ruppe, with reference to the value of the goods that were damaged and the extent of damage to those goods, for the reason that there is no legal evidence which would authorize the court to submit to the jury the question of such damages, and for the further reason that no such damages are claimed in complaint, and no such item is contained in the bill of particlars made under the order of the court."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 284.)

LXII.

The district court erred in overruling the motion of the plaintiff in error Barnett:

"I further move the court to strike out all of the testimony of the witness, Ruppe, which was given after refreshing his recollection by the use of the bill of particulars while he was on the witness stand, for the reason that no proper foundation was laid for permission to the witness to use the bill of particulars for the purpose of refreshing his recollection; and it affirmatively appears that that bill of particulars was a copy of another list which was contained in a book which was lost; that the loss of the book was not sufficiently established, and for the further reason that if the book were here it was not such a memorandum as under settled rules of evidence the witness, Ruppe, would be permitted to refer to for the purpose of refreshing his recollection; it affirmatively appearing that it was not made at or near to the time of the transaction with which it purports to deal; was not made on Ruppe's personal knowledge, but was made up over a period of months of time in which he listed in that book such articles of merchandise as he missed out of his stock, for months after the fall of the wall, and upon consultation with Baltes and Mallette, his clerks; and that he put on that list such articles of merchandise as were not found in his stock from time to time, whenever he did not remember that they had been sold, or whenever Mallette did not remember that they had been sold, or whenever all or any one of these remembered that they had had those things in stock before the removal from the build-

ing which fell down; and it further affirmatively appears that this was not a writing which was shown by the witness to be correct at the time it was made, or one which he would be authorized under the law to inspect for the purpose of refreshing his memory; neither was the writing, or a copy of it, legal evidence of any fact therein contained."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 284.)

LXIII.

The district court erred in overruling the motion of the plaintiff in error Barnett:

"I move to strike out all of the testimony of the witness, Ruppe, with reference to the character of the business section of the town of Albuquerque and the relative—I do not remember just what term was used—availability, I will say that—the witness did not say that—availability of its purpose—of the various places to which he moved after the fall of the wall, and his opinion as to how much better a place of business the one which he rented from Weinman was to the other places to which he moved—the relative availability of the business location, because no proper foundation was laid for such evidence, and in the second place there is no evidence that the defendants, or either of them, notified Mr. Ruppe to engage in business at any other

> place, except the Weinman place, and testimony as to these points, to which, by this particular objection attention is called, tends to mislead the jury and introduced a false issue in the case."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 284-5.)

LXIV.

The district court erred in overruling the motion of the plaintiff in error Barnett:

> "I move to strike out all of the testimony of the witness, Ruppe, with reference to the loss of profits, as well as all the testimony as to the amount of cash sales and his estimate of expenses, and of all testimony of that character, because in the first place no proper foundation was laid for it, and in the second place it was largely opinion evidence, and in the third place the evidence is wholly insufficient taken as a whole, together with all the other evidence in the case, to authorize the court to submit to the jury the question of loss of profits."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 285.)

LXV.

The district court erred insustaining the objection to the question:

"Q. Well, what was the condition of the foundation over the excavation at the northeast corner of the wall?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr 299.)

LXVI.

The district court erred in overruling the objection to the question:

"Q. Well, was this testimony, as you gave it then, true according to your recollection as it was then?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 300.)

LXVII.

The district court erred in sustaining the objection to the question:

"Q. Now, I want to ask you again: if you did not tell me in my office last Saturday afternoon that at the time this foundation was uncovered you were working at the brewery, and Ed Steiner was in charge of the work?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 307.)

LXVIII.

The district court erred in sustaining the objection to the question:

> "Q. Now, state Mr. LaDriere, whether or not that wall was ever built, or that foundation plan that you have testified to, was ever carried out?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 309.)

LXIX.

The district court erred in sustaining the objection to the question:

> "Q. Now testifying from your experience as an architect, and your knowledge of the conditions that existed, state whether or not that party wall might have been built according to the plans and specifications, with safety to the Ruppe wall, had it been a solid wall, firm, straight and in line?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 311.)

LXX.

The district court erred in overruling the objection to the question:

> "Q. If you did so testify was that testimony true?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 341.)

LXXI.

The district court erred in overruling the objection to the question:

> "Q. Well, is your recollection better or poorer now as to those facts, than it was when you testified upon that trial in 1906?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 365.)

LXXII.

The district court erred in permitting defendants in error to read in evidence the release from Weinman to Barnett, and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 382.)

LXXIII.

The district court erred in overruling the objection to the question:

> "Q. Would your answer have been the same had there been two successive excavations under the front end of the wall, each of them approximately five feet in length and extending substantially, or quite, under the wall, with a pier of dirt between, four or five feet in length?"

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 387.)

LXXIV.

The district court erred in overruling the motions to strike out the evidence renewed, and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 418-21.)

LXXV.

The district court erred in giving to the jury Paragraph One of the charge, and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erreoneous. (Tr. 421-2.)

LXXVI.

The district court erred in giving to the jury Paragraph Six of the charge:

> "You are further instructed that if you believe from the evidence that one of the plaintiffs, B. Ruppe, stood by, knowing the kind of wall that was to be erected, where it was to be placed, and the manner in which the same was to be erected and acquiesced in the erection of the same, and by his conduct, led the defendants to believe that he acquiesced and consented to the erection of the same, as it was to be erected, then the plaintiffs are estopped from recovering in this action for damages occasioned by doing anything to which they so consented.

> But if the plaintiff, Ruppe, was misled by representations made by or in behalf of the defendants, or either of them, as to the safety of what it was proposed to do, and was not so well qualified to judge as to their truth, as were those who made them, and for that reason acquiesced, then the plaintiffs are not estopped by such acquiescence."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 423.)

LXXVII.

The district court erred in giving to the jury Paragraph Eight of the charge:

> "You are further instructed that unless you believe from a preponderance of the evidence that the wall of the building occupied by the plaintiffs fell by reason of excavation made upon lot number 2 in block 16, that such excavation so made upon lot number 2 and block 16 was the proximate cause of the fall of the said wall, you should find the issues for the defendants; otherwise you should find the issues for the plaintiffs."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 423-4.)

LXXVIII.

The district court erred in giving to the jury Paragraph Thirteen of the charge:

"You are further instructed that the defendant Weinman had no lawful right, without the consent of the plaintiffs, to go upon lot 2 if it was occupied by the plaintiffs as his tenants under the lease in evidence, and to erect a wall on the line between said lot 1 and 2, a part on each lot, or to tear down the wall or any portion thereof, of the building so occupied by the plaintiffs, and that he could not give the defendant Barnett and lawful right to do that which he, the defendant Weinman, had not the right to do."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 425.)

LXXIX.

The district court erred in giving to the jury Paragraph Fourteen of the charge:

"You are instructed that any actual expulsion of the tenants by the landlord or by any person acting by his authority, or anything so done which so seriously disturbs the tenant's possession as to compel an abandonment of the premises by them, or which deprives him of their beneficial enjoyment, amounts to an eviction and the rent is suspended from the time of such expulsion or disturbance."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 425.)

LXXX.

The district court erred in giving to the jury Paragraph Fifteen of the charge:

> "You are further instructed that if you find from a preponderance of evidence that the defendant Barnett, in pursuance of the contract between himself and the defendant Weinman and without the consent of the plaintiffs, caused excavations to be made on said lot 2, or any portion thereof, either by his agents or servants, or by any independant contractor, then both these defendants, Weinman and Barnett, were equally guilty of trespass, and it is immaterial that the parties doing the work were also trespassers because the plaintiffs had the right to sue any one or more of those guilty of trespass."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 425.)

LXXXI.

The district court erred in giving to the jury Paragraph Seventeen of the charge:

> "If you find from a preponderance of the evidence that said defendants committed the acts complained of by said plaintiffs, and you further find that the plaintiffs were damaged thereby, then you will find from the evidence the amount which was the natural and proximate consequence of the said wrongful

act of the defendant, and your verdict should be in such amount as will compensate the plaintiffs for the damage suffered."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 246.)

LXXXII.

The district court erred in giving to the jury Paragraph Eighteen of the charge:

> "You are further instructed that in arriving at said amount you may take into consideration the testimony regarding the loss of profits occasioned by the removal to another location, the testimony regarding the value of the stock of merchandise and fixtures destroyed, if any were destroyed, and the testimony regarding the injury and damage, if any, to the remaining stock and fixtures, the testimony regarding reasonable expenses in removing to another location, and the repair of the fixtures and furniture partially destroyed, and the testimony regarding such other items to which it relates, as are the proximate consequences of the acts of the defendants, if you believe from a preponderance of the evidence that the acts of the defendants complained of were the proximate cause of any loss or damage to the plaintiffs."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the

district court as erroneous. (Tr. 246.)

LXXXIII.

The district court erred in giving to the jury Paragraph Nineteen of the charge:

> "You are instructed that an established business is capable of injury or destruction, as a house or other material object is, but in the nature of the case it is much more difficult to determine the value of a business destroyed or the amount of damages to it if injured than it is to determine the value of a house or the injury to it. To illustrate, a man may have an established business of growing vegetables for the market and may have customers in his neighborhood who are in the habit of buying of him; he may have a lease of a parcel of land on which he grows the vegetables on which crops will not grow without irrigation. The land may be irrigated from a stream which is the only source from which it could be irrigated. That stream might be diverted at its source by the work of man or by some convulsion of nature, so that it would be no longer possible to irrigate the land. In that way his business might be wholly destroyed. If he could get other land, not too far from his customers on which he could grow vegetables his business might not be destroyed or even injured. It might cost him something to make the necessary changes, but that would not be injury to his business as such. Injury to the business would consist in loss of trade or greater expense

in supplying his customers, or both. To show what the injury to the business was, evidence in relation to the profits before and after the change would be admissible, but would not be alone and in itself conclusive.

If under instructions given you and on the evidence you have heard, you determine that the plaintiffs are entitled to recover damages from the defendants, you should then determine from the evidence the value of the personal property of the plaintiffs, if any, which was wholly destroyed, and in doing that take its market value in Albuquerque at the time, not at retail in the business of the plaintiffs, but the cost to them as apothecaries, to replace the goods destroyed in their stock in Albuquerque, and in determining the damages to plaintiffs, if you find there was any from injury to goods which were wholly destroyed or lost, you should take the difference, if you can determine it from the evidence, between the market value before the injury of such goods in Albuquerque, as already explained to you and their value determined in the same way after they were injured."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneos. (Tr. 426-7.)

LXXXIV.

The district court erred in giving to the jury Paragraph Twenty of the charge:

> "You are instructed that if you find the plaintiffs are entitled to any damages, you may take into consideration, if you think fit, the length of time which has elapsed since the damage occurred, and, if you think fit, give damages in the nature of interest over and above the property damage actually suffered by the plaintiffs."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 427.)

LXXXV.

The district court erred in giving to the jury Paragraph Twenty-seven of the charge:

> "You will have with you two forms for a verdict, by one of which you will find for the defendants, and, by the other, for the plaintiffs. In the latter will be a space for the amount of damages you may assess."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 429.)

LXXXVI.

The district court erred in refusing to instruct the jury to find the issues for Barnett:

> "The defendant Barnett asks the court to instruct the jury to find the issue for the defendants."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 429.)

LXXXVII.

The district court erred in refusing to instruct the jury as follows:

> "The court instructs the jury that if they believe from the evidence that the wall of the building occupied by the plaintiffs fell because of any inherent defects in the wall itself, or because of the caving of lot number two, in block sixteen, they should find the issues for the defendants, notwithstanding they may believe from the evidence that such caving of lot number two, in block sixteen, was occasioned by excavations made on lot number one, in block sixteen, which excavations deprived lot number two of the lateral support heretofore furnished to it by lot number one prior to the excavation."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 429.)

LXXXVIII.

The district court erred in refusing to instruct the jury as follows:

> "The court instructs the jury that before the plaintiffs can recover in this action, they must satisfy the jury by a preponderance of the evidence that some of the injuries alleged in the complaint were

occasioned by some wrongful act committed by the defendants, and it is not sufficient that the plaintiffs shall by evidence make it appear that some act of the defendants might have caused such injury, but on the contrary, the jury must be satisfied by a preponderance of the evidence that some act of the defendants did cause such injury or the plaintiffs can not recover."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 430.)

LXXXIX.

The district court erred in refusing to instruct the jury as follows:

"The court instructs the jury that there is no presumption that the wall of the building in question fell because of anything done by the defendants, or either of them, and before the plaintiffs can recover in this case they must satisfy the jury by a preponderance of the evidence that the injuries alleged in the complaint were in fact occasioned by some wrongful act committed by the defendants, and not merely that they might have been so occasioned."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 430.)

XC.

The district court erred in refusing to instruct the jury as follows:

> "The court instructs the jury that the owner of a building lot in Albuquerque, such as the lots referred to in the evidence in this case, owes no duty to the owner of an adjoining lot to furnish support for any building or structure which may be erected or standing on such adjoining lot, but it is the duty of every such owner to see to it, at his peril, that the foundations and walls of his structure are of a strength and stability sufficient to sustain themselves without lateral assistance from adjoining property."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 430.)

XCI.

The district court erred in refusing to instruct the jury as follows:

> "The court instructs the jury that the defendant Barnett was not a party or privy to any contract between the plaintiffs and the defendant Weinman in relation to the building and structure mentioned and described in the lease in evidence; that this is not a suit for the recovery of damages growing out of the breach of any contract rights of the plaintiffs, but is a suit for wrongs alleged to

have been done by the defendants to the plaintiffs."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 430.)

XCII.

The district court erred in refusing to instruct the jury as follows:

"The court instructs the jury that if they believe from the evidence that the defendant Barnett employed a competent architect to prepare plans and specifications for the construction of a building on lot number one in block sixteen, of the original townsite of Albuquerque, and if the jury further believe from the evidence that the said defendant Barnett employed a competent person to erect a building and make excavations in accordance with the said plans and specifications, and if the jury further believe from the evidence that it was practicable to so erect and construct the said building in accordance to the said plans and specifications without injury to the plaintiffs in this case, then the plaintiffs cannot recover from the defendants, even though the contractor employed by the said defendant Barnett in the execution of his contract, committed some act which amounted to a trespass upon the rights of the plaintiffs, but the remedy of the plaintiffs, if any, for such trespass, is against the contractor and not against

the defendants in this case.

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 431.)

The district court erred in refusing to instruct the jury as follows:

> "The court instructs the jury that they are not bound to accept as true the testimony of the plaintiff, B. Ruppe, as to the quantity or value of the property lost or destroyed or injured by reason of the fall of the wall of said building, as testified to by the witnesses, but it is the duty of the jury to determine the amount and extent of the loss of the plaintiffs, if any, from all of the evidence in the case and from their general knowledge of human affairs, and if the jury believe from the evidence that the plaintiff B. Ruppe has suppressed any fact in connection with the value or quantity of goods lost, or has attempted to exaggerate in any manner the extent of his loss, they have the right to take such fact into consideration in determining the extent of the plaintiff's damages. In no event can the plaintiffs recover in this case a sum in excess of the actual damages suffered and sustained by them, which damage must be directly attributable to some wrongful act on the part of the defendants, and before the plaintiffs can recover any damages against the defendants they must satisfy the jury by a preponderance of the evidence that such damages were occa-

sioned by some wrong on the part of the defendants. It is not sufficient that they shall show that some wrongful act on the part of the defendants might have occasioned the damages."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 431.)

XCIV.

The district court erred in refusing to instruct the jury as follows:

"The court instructs the jury that in assessing the plaintiffs' damages they can allow nothing for the injury to to goods by reason of their being rendered unsalable, as testified to by the witness Ruppe, because there is no legal evidence of such damages, and the statement by said witness that such damages amounted to the sum of five hundred dollars is insufficient in law to warrant a finding by the jury that any such damage was so suffered."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 431-2.)

XCV.

The district court erred in refusing to instruct the jury as follows:

"The court instructs the jury that if they believe from the evidence that the

plaintiffs, or either of them, with full knowledge of the terms of the party wall agreement, encouraged the defendants to proceed with the execution of the said agreement, and did not object to the excavation being made on lot number two, in pursuance of the said agreement, then and in that case the plaintiffs are estopped to claim that such excavation on lot number two by the defendants, if made, was a trespass upon their rights as tenants of the said lot."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 432.)

XCVI.

The district court erred in refusing to instruct the jury as follows:

"The court further instructs the jury that the plaintiffs claim damages from the defendants for injury to and destruction of personal property, and for an injury to their estate in lot number two, in bolck sixteen, of the original townsite of Albuquerque, described in the complaint, that the estate of the plaintiffs in the said lot number two, in block sixteen, was an estate for years subject to be terminated by default in payment of the rent reserved by the terms of said lease; that it is admitted by the pleadings that the plaintiffs failed to pay an installment of the rent reserved at the time when the same became due, and the de-

fendant Weinman by reason of such default in the payment of said rent became entitled to re-enter and take possession of the said premises; that the plaintiffs can recover from the defendants, if at all, no damages to their interest in the said real estate which accrued subsequent to the termination of their estate therein as defined in this instruction."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 432.)

XCVII.

The district court erred in refusing to instruct the jury as follows:

"The court instructs the jury that while the owner of the fee in real estate is entitled to dominion over the same from the dome of the heavens to the center of the earth, the right of the tenant for years is not necessarily coextensive with that of the owner of the fee, but the right of such tenant, unless expressly enlarged by the terms of the grant, is limited to the use and occupation of the demised permises in the condition in which they are at the time possession is received, and in this case a lateral excavation below the surface of the earth, extending a short distance below the property line between lot number one and lot number two, if any such excavation was made, was not necessarily a tres-pass upon the rights of the plaintiffs, and the plaintiffs cannot recover in this action for any such excavation, even if the jury shall believe that such

> excavation was made, unless they shall satisfy the jury by a preponderance of the evidence that such excavation was the proximate cause of the destruction of the wall of the building occupied by the plaintiffs."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 432-3.)

XCVIII.

The district court erred in refusing to instruct the jury as follows:

> "The court instructs the jury that the plaintiffs, under the lease offered in evidence by them, were bound to pay rent for the premises described therein, notwithstanding the destruction of the building upon the said premises by the wrongful act of the defendants or their employes; that a refusal of the plaintiffs to pay such rent, when the same by the terms of the lease became due and payable authorized the defendant Weinman to re-enter and take possession of the said premises without process of law, and the estate of the said plaintiffs in the said premises became and was terminated by said re-entry for the non-payment of rent, which non-payment of rent is admitted by the pleadings in this case."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 433.)

XCIX.

The district court erred in refusing to instruct the jury as follows:

> "The court instructs the jury that there was no evidence in this case that it was necessary for the plaintiffs to remove to the premises to which they did remove, or that such premises were at the time of removal suitable for the business which the plaintiffs proposed to carry on therein, or that plaintiffs might not have obtained other premises more suitable for their purposes and where their business would have been more profitable, and there is no evidence that the plaintiff's made any effort to find premises where they could carry on their business with the same profit as had been made in the Ruppe building, and there is no evidence that suitable premises might not have been obtained in the immediate vicinity of the place where plaintiffs had previously carried on business, and therefore the jury should disregard all evidence as to the loss of profits by the plaintiffs in this case."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 438.)

C.

The district court erred in refusing to instruct the jury as follows:

> "The court instructs the jury that this is an action of tort in which the plaintiffs

> seek to recover damages for loss and damages to certain goods, wares and merchandise, as well as damages to loss of profits, which the plaintiffs claim they would have made but for the wrong of the defendants. You are instructed that if you find for the plaintiffs, you may, if you see fit to do so, give damages in the nature of interest over and above the value of the goods at the time of the injury, but you are not bound to do so and you are not at liberty to award to the plaintiffs interest to any other extent or on any other account."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 433-4.)

CI.

The district court erred in refusing to accept the verdict of the jury as first returned into court, and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 442.)

CII.

The district court erred in instructing the jury before their retirement after first presenting their verdict, as follows:

> "Gentlemen: If by the verdict you have brought in assessing the plaintiffs' damages against the defendants at five thousand dollars with six per cent interest, you mean that something in the na-

ture of interest up to the present time be added to the sum of five thousand dollars you name, you shall yourselves determine the amount, under the instructions given you, and it will be the better way to add to it whatever other sum you may find, so as to make one total. The court has no right to make the computation or determination for you. If it is not your intention to add anything in the nature of interest up to the present time, to said sum of five thousand dollars, you should make your meaning clear by your verdict.

Another blank form for a verdict will be furnished you to be filled out and returned as you have been instructed.

Following which instructions the court:

The Court (to jury): I will add if there is anything about the law of the matter which you do not understand, you may ask the Court for further instructions."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 443.)

CIII.

The district court erred in overruling the following objection:

"To which remark of the court the defendants except. The defendants, Weinman and Barnett, each for himself excepts to the action of the court refusing to receive the verdict heretofore rendered

by the jury as rendered by them and to the action of the court in returning the jury to the jury room for further deliberation, on the ground that the court has no power to do so. The defendants, Jacob Weinman and Joseph Barnett object to the giving of this instruction by the court, or any other instruction at this time for the reason that the general verdict returned by this jury is plain and does not require any explanation and should be received by the court as it stands; for the further reason that there is no authority of law for the court giving the jury any instructions at this time; the instructions formerly given by the court on his own motion with reference to what the jury might do in finding damages in the nature of interest having been plain and requiring no explanation, and for the further reason that the court has no power or authority to do anything but to accept and receive the verdict as rendered by the jury."

And the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 443.)

CIV.

The district court erred in receiving the second verdict of the jury and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 444.)

CV.

The district court erred in refusing to send up

for examination by the Supreme Court of New Mexico original exhibits "I," "L," "M," "N-1" to "N-5" inclusive, and "O-1" and "O-2," it being impracticable to incorporate them in the Bill of Exceptions, and the Supreme Court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. (Tr. 456-7.)

CVI.

The Supreme Court of New Mexico erred in refusing to consider on review of this case the original exhibits which had been theretofore brought into that court by *certiorari* for such use, it affirmatively appearing from the language of the opinion:

> "Complaint is made by defendants on account of the refusal of the trial judge to send up to this court some of the books offered in evidence. If these books would have aided us in determining this cause they should be here and the defendants should have taken such steps as the law provides for having them sent up,"

that such exhibits were not considered or examined by the said Supreme Court of New Mexico, although properly before that court for examination. (Tr. 490, 525.)

CVII.

The Supreme Court of New Mexico erred in ruling that exhibits "I," "L," "M," "N-1" to

"N-5" inclusive, and "O-1" and "O-2," as used in the district court of Bernalillo County upon the trial of said cause, were not properly before the said Supreme Court for consideration on the said review. (Tr. 525.)

CVIII.

The Supreme Court of New Mexico erred in modifying the judgment of the district court of Bernalillo County by requiring defendants in error to remit only the sum of $770.00, and not requiring the said defendants in error to remit all damages allowed by the jury for loss of profits. (Tr. 494, 497, 526.)

CIX.

The Supreme Court of New Mexico erred in awarding to the defendants in error interest on the amount of $6968.00 from the ninth day of April, 1910, after having modified and reduced the judgment of the defendants in error as recovered in the court below by the sum of $770.00. (Tr. 498, 526.)

CX.

The Supreme Court of New Mexico erred in affirming and in not reversing the judgment of the district Court of Bernalillo County. (Tr. 498, 526.)

The record in this case is unnecessarily voluminous, but for the purposes of this review I shall attempt to state a few well-defined legal propositions, which in one form or another arise under

these assignments of error, and to persuade the court:

1. That, assuming that the plaintiffs in error are liable to defendants in error for any damages which they may have suffered by reason of the collapse of the wall of the building in which they were doing business on the 30th day of June, 1902, such errors were committed in the rulings on evidence as demand a reversal of this case, and that such errors consisted not only in the admission of improper evidence and the rejection of proper evidence, but also in such abuse of discretion by the trial judge in rulings upon discretionary matters as amounts to error in law.

2. That the charge of the court was erroneous, and that some paragraphs of the charge were inconsistent with other paragraphs and furnished to the jury an erroneous and misleading guide for the determination of the question of the liability of the plaintiffs in error for such damages.

3. That the court refused to give requested instructions which should have been given.

4. That the charge of the court with reference to the measure of damages was erroneous and highly prejudicial, and that the court refused proper instructions propounded by plaintiffs in error on these points.

5. That the jury were by the charge of the court as applied to the evidence in the case, permitted to allow interest in excess of six per cent

per annum, in violation of the provisions of the statute of New Mexico, and that the last verdict of the jury as returned demonstrably exceeds by more than $778.80 the amount of damages assessed in the first verdict brought in, and six per cent interest from the date of the injury to the rendition of the verdict, and in this connection that the Supreme Court of New Mexico should have required the defendants in error to remit $1,543.80, even upon the theory of the case which that court appears to have sustained.

6. That the requirement of a remittitur by the defendants in error was by no means adequate to the correction of the errors committed in admitting the evidence as to the value of the damaged goods and the loss of anticipated profits in the sale thereof.

I shall not, however, attempt in the presentation of these various matters to adhere to the order above indicated, but they will be generally discussed under the following points and authorities.

POINTS AND AUTHORITIES.

I.

THE RULINGS ON THE EVIDENCE COMPLAINED OF WERE FUNDAMENTALLY ERRONEOUS AND HIGHLY PREJUDICIAL.

Starting with the evidence offered on behalf of defendants in error to establish their actual loss, I submit that the witness Ruppe should not have

been permitted to use the bill of particulars to refresh his memory, because it affirmatively appears from his testimony that after the building fell and he had removed his remaining stock into the Grant building, he had an inventory of the goods which had been contained in his store, taken in the month of June, 1902, and invoices showing goods subsequently purchased, and that he failed to take an inventory after arranging his goods upon the shelves in the Grant building, as he should have done. He has given in great detail the process by which he made up the bill of particulars. Without attempting even to recapitulate his testimony on this point, I submit that it demonstrates that the bill of particulars is no more than written hearsay; that it is, in its most favorable aspect, a memorandum in writing, made at various times extending over months of time, of the concurrent recollection (or lack of recollection) of himself and his two clerks with reference to its items, aided by invoices which he then had and by the inventory which had been made of the stock in the Weinman store in the month of June. With reference to this bill of particulars the Supreme Court of New Mexico, in its opinion on the second review, said:

> "Both appellants complain of the action of the trial court in permitting the witness Ruppe to refresh his memory by reading from the bill of particulars filed in the case by order of the trial court, as

to the items of goods destroyed and their values. The witness, it is vigorously contended, merely read the bill of particulars to the jury, and a bill of exceptions duly allowed and signed appears at page 176 of the record, reciting that the court over the objection of counsel permitted the witness to read from the bill of particulars, etc.

Upon cross examination the witness testified that the items in the bill of particulars were made up from invoices and inventories taken by himself and his clerk just prior to the damage, deducting his sales and then checking up what was missing, and that it was, as he believed, correct at the time the bill of particulars was made up.

It is impossible to lay down an invariable rule upon the subject of the refreshment of a witness's memory, and just how and when it may be done is therefore subject to the circumstances of the particular case, to a great degree. It is laid down, however, that any writing may, under certain circumstances, be used for the purpose of stimulating and reviving the memory of a witness, even though it was not made by the witness himself, and though it may be only a copy of the original writing. 1 Wigmore on Evidence, Secs. 758, 759, 760; 3 Jones on Evidence, Secs. 884, 885.

In the case at bar the bill of particulars consisted of a long list of articles and the prices of the same, compiled by the witness and his clerk, and it would have been an utter impossibility for any per-

son to have remembered the items therein set out.

In such cases it has been held, and we think properly, that the memoranda may be read to the jury if the witness knows them to be correct, even though the writing itself cannot bring to his mind independently the separate items. * * * * *

Under the circumstances of this case we do not think the court erred in permitting the witness Ruppe to read from the bill of particulars the several items of the goods destroyed, taken as it was from the only source from which anything like an accurate estimate of the goods and their value could be ascertained. It is certainly not the law that a merchant must be able to recall from memory every article in his store and its value before he can recover damages for los sthereof by reason of some one's wrongful act. To so hold would be equivalent to saying there could be no recovery."

Di Palma v. Weinman, 15 *N. M.*, 68, 86-87.

This court has not before it the evidence to which the Supreme Court of New Mexico refers in the paragraph quoted, but certainly that court fails to take notice of fundamental objections which I here seek to call to the attention of the court. The proposition which I submit certainly involves no contention "that a merchant must be able to recall from memory every article in his store and its value before he can recover damages

for loss thereof by reason of some one's wrongful act." It rather involves the proposition, that a merchant may not reject the means of perpetuating evidence of the actual facts with reference to his loss and substitute therefor speculation and conjecture by his clerks and himself, and then be permitted to recover damages upon the theory that he has adduced the best evidence of which his case was susceptible. If Mr. Ruppe had used the inventory and invoices which he then had and had made an inventory of the goods saved, he could with that data have made a memorandum showing the amount and value of the goods actually destroyed which would have obviated the objections to the proof of his actual loss now urged, and which would have established his actual loss with a degree of certainty approximating mathematical accuracy. Having failed to do this, he is permitted to substitute for legal evidence, speculations and conjectures of himself and his clerks, and in so doing to use a writing which at the time it was made was not known to him to be true of his personal knowledge, which was not made at or near the time of the transaction to which it relates, and which purports to be no more than his then estimate of matters as to which he never had or claimed to have accurate knowledge. Aside from the value of the electric piano, some shelving and show cases, there is not in this record any legal evidence as to the amount or value of the

goods actually lost. This bill of particulars failed to meet the requirements of the law as a writing which could be used to refresh the memory of a witness, as those requirements are established by the decisions of this and other courts and by elementary writers on the law of evidence.

1 *Greenl. Ev., Sec.* 436.
1 *Phil. Ev.*, 289.
1 *Wig. Ev. Secs.* 744, 763.
Insurance Co. v. Weides, 14 *Wall.* 375.
Bates v. Preble, 151 *U. S.* 149.
Norwalk v. Ireland, 68, *Conn.* 1.
Curtis v. Bradley, 65 *Conn.* 99.
Peterson v. Mineral King Co., 74 *Pac.* 162.

As to the evidence of damage to goods not entirely destroyed, the Supreme Court of New Mexico, on the second review, said:

> "Nor was there any competent proof of the damage to goods not entirely destroyed, that is, of damage suffered to goods made unsalable by dirt, torn boxes, etc., the testimony of Mr. Ruppe on that item being purely an estimate on his part, as shown by pp. 196-197 of the record."

Di Palma v. Weinman, 15 *N. M.* 68, 90.

And on the review now under discussion that court said:

> "The proof as to damaged goods, that

is goods not entirely destroyed, should have been excluded, as it is no more competent than at the former hearing in this case. That was for an item of $500.00.

* * * * If the plaintiffs will file a remittitur of $770.00, being $500.00 on account of plaintiffs' claim of that amount for damaged goods and $270 interest thereon, the judgment of the lower court will be affirmed; if not it will be reversed."

Di Palma v. Weinman, 16 N. M. 302, 318.

and assuming that the error could be corrected by a remittitur, required the defendants in error to remit $770 of their judgment. I deem it pertinent to call the attention of this court to the fact that the only evidence on this point was that of the witness Ruppe, who testified that upon goods which cost him $400 and which he sold after the accident for $300, both of which, by the way, were mere estimates by Ruppe, he had suffered a loss of $500, and the jury found in accordance with this testimony, as was assumed by that court. Upon the authority of several decisions of this court, I submit that it cannot be said, as a matter of law that this testimony affected the verdict of jury only to the extent of $500 and interest thereon, but, on the contrary, that there is a reasonable probability that it tainted the entire verdict.

"It is true, in some instances, there

may be such strong impressions made upon the minds of a jury by illegal and improper testimony, that its subsequent withdrawal will not remove the effect caused by its admission; and in that case the original objection may avail on appeal or writ of error. But such instances are exceptional."

Hopt v. Utah, 120 *U. S.* 431, 438.

"Thus, the case in its entire aspect was seemingly conducted in such a manner as to render the illegal use of evidence possible and to permeate the whole record and render the verdict erroneous."

Waldron v. Waldron, 156 *U. S.* 361, 384.

"It is at least questionable whether the case does not come within the exception to the rule by reason of the possible impression produced upon the jury during the long trial, in which the evidence of several witnesses upon this point was given after much opposition and long argument as to its admissibility."

Throckmorton v. Holt, 180 *U. S.* 552, 568.

Assuming for the purposes of this argument only, that defendants in error were entitled to recover as part of their damages, the gains prevented or anticipated profits lost by the collapse of the building in which they were engaged in business, I submit with confidence that there is no legal evidence from which the jury could estimate any

such damages, and that it was fundamental error to submit to the jury the question of loss of profits. I assume it will be admitted, but if not admitted the record amply sustains the statement, that the basis for the claim of lost profits was Ruppe's statement that "in my experience as a druggist in figuring profits that I have made on my business, I figure that my business produced me on the average of 40 per cent gross" supplemented by his testimony from his books of account as to the amount of his daily sales and from the entries in the books themselves, which were offered and received in evidence over objections, together with his estimate that his monthly expenses were $434 per month for the entire period. As to the matter of loss of profits, the Supreme Court of New Mexico, in the review which was had in 1909, said:

> "There is, however, no evidence of loss of profits except the bald statement of the witness Ruppe as to the net profits per month during the time he occupied the Weinman premises; and at the location to which he removed his stock after the wall fell; true, the record shows that he referred to some memorandum to refresh his memory, but it nowhere appears what the memorandum was, nor when or by whom it was made; nor does he state that he knows or even believes it to be correct. This being true, it was error to submit the question of loss of profits to the jury, there being no sufficient evidence to sustain a verdict of such loss."

Di Palma v. Weinman, 15 *N. M.*, 68, 89-90.

It appears, therefore, that the books of account so much relied on now, were not offered on the trial then under review. In the opinion affirming the judgment now before this court, the Supreme Court of New Mexico said:

> "At the trial, from which this appeal is taken, the witness Ruppe produced a cash book, several day books, a soda fountain book and a ledger kept by plaintiffs in the regular course of their business, and from these books, and especially from the cash book, the plaintiff Ruppe stated what were the cash receipts of the business of plaintiffs for six and one-half months they occupied the Weinman building, and for the remainder of the term of their lease from Weinman, in the locations to which they were compelled to move. The witness Ruppe testified that he had been a pharmacist for thirty-five years and for over thirty years had been engaged in that profession in Albuquerque and that he and Di Palma had been partners in the retail drug business there since 1894. In reply to a question as to what his gross profits on sale in the retail drug business had been, he said: 'A good many of the medicines came with the prices marked thereon; others we figured the cost and what they were worth at retail is marked thereon; prescriptions are compounded and the profit is figured on the drugs and the time used in preparing

the same. Certain goods such as sundries and articles of luxury are generally figured at a percentage ranging from fifty to one hundred per cent; prescription compounding must bring more than one hundred per cent; patent medicine profits range all the way from 25 to 35 per cent; in my experience as a druggist in figuring profits that I have made in my business, I figure that my business produced me on the average of 40 per cent gross.' As to the monthly expenses of the business, the witness testified that plaintiff's expenses were $434.00 per month. This he stated from memory and on cross- examination said that he had no record of any kind of the monthly expenses, but could and did state the same from memory solely. The defendants claim that these books, for various reasons, furnish no basis for an intelligent estimate of profits derived from the business and cannot possibly corroborate the testimony of the witness. Their reasons are (a) the books contain no stock account; (b) they contain no account of Richard Di Palma and B. Ruppe as partners; (c) they contain no showing of the amount of capital invested; (d) they contain no account from which a bookkeeper could ascertain the percent of profits realized; (e) or how much merchandise was bought; (f) nor what the expense of conducting the business was."

Di Palma v. Weinman, 16 *N. M.* 302, 308-9.

This statement was based upon the assumption

that the books mentioned in it were not before that court, and that they had been properly used in the court below to supplement the testimony of the witness Ruppe. Those books were properly before that court, and are before this court, and very little examination of them will demonstrate that they amount to nothing more than self-serving memoranda reduced to writing by the witness Ruppe; that they contain no data by which to test his estimates and that as partnership books they fail to meet the requirements of the statute of New Mexico, and that as shop books of account merely, the requirements of the statute regulating the admission in evidence of such books were not only not met, but no effort whatever was made to meet them, except that they were inspected by the trial judge and pronounced by him to be free from suspicion of fraud.

The statute regulating the admission of books of account is as follows:

> "Sec. 3031. Hereafter in the trial of a civil cause in the courts of this territory, the books of account of any merchant, shopkeeper, physician, blacksmith or other person doing a regular business and keeping daily entries thereof, may be admitted in evidence as proof of such accounts upon the following conditions:
>
> First. That he kept no clerk, or else the clerk is dead or inaccessible.
>
> Second. Upon proof, the party's oath being sufficient, that the book tendered is

the book of original entries.

Third. Upon proof, by his customers, that he usually kept correct books.

Fourth. Upon inspection by the court to see if the books are free from any suspicion of fraud."

Comp. Laws of New Mexico, 1897.

This statute has been twice construed by the Supreme Court of New Mexico.

Byerts v. Robinson, 9 *N. M.*, 427.
McKenzie v. King, 14 *N. M.*, 375.

While it is true that there is nothing in this record to show that the memorandum referred to in the opinion in 15 New Mexico was taken from the books referred to in the last opinion, there is equally nothing to show that it was not, but from all the evidence the conclusion is irresistible that no other data of that character was then in existence. If the book Plaintiff's Exhibit L was in existence in November, 1906, when the witness Ruppe gave the testimony which was commented on in the opinion in 15 New Mexico, it certainly was not produced upon that trial, and there is persuasive ground for suspicion that it was not then in existence, apparent upon the face of the book itself. It is wholly in the handwriting of Mr. Ruppe, and althought it purports to have been in daily use in that store for a period of years,

it bears none of the ordinary evidences of having been used; it contains blank plages which Ruppe never discovered until his attention was called to them when on the witness stand, and contains one page headed "1908" when it should have been "1905." (Tr. 251.) The witness Baltes never saw the book during the time he was in Ruppe's employ, although he worked on the books. (Tr. 335.) The entries in the book were based in part, at least, upon memoranda made by others and not known by Ruppe at the time to be true. (Tr. 250.)

It is not without significance, I submit, that this cash book is offered as original evidence to corroborate the testimony of the witness Ruppe that during six and one-half months of his occupation of the Weinman building his total cash receipts were $14,186.31 (Tr. 186), and that his gross profit on those sales was $5,674.52 (Tr. 188), and that from a stock of merchandise returned for taxation under oath by Father Di Palma which gave the average value of merchandise during the year at $1,200. (Tr. 295.)

Giaccommi v. Bulkeley, 51 *Cal.* 260.

Paola Gas Co. v. Paola Glass Co., 44 *Pac.* 621.

Boston & A. R. R. Co. v. O'Reilly, 158 *U. S.*, 334.

Miller v. Wilkesbarre Gas Co., 206 *Pa. St.* 254.

But there is still another statute of New Mexico affecting the admissibility of these books, which seems not to have been considered by the Supreme Court on either review. So much of that statute as bears upon the question is as follows:

> "Sec. 2647. Any two or more persons in this territory may, and when they shall think proper, bind themselves mutually, for a certain time and under certain conditions, to do and follow at the same time various negotiations on their own common account and risk, or at that of each one of the partners respectively, as well in the losses as in the profits that may arise from said co-partnership."
>
> "Sec. 2650. The company shall keep their books in due form, with an inventory of their stock and capital, keeping an account of all the business they transact: *Provided*, That no partner shall withdraw from the capital or profits, until the dissolution of the co-partnership, any sum not stipulated in the indenture."

Comp. Laws of New Mexico, 1897.

I have been unable to find in any other jurisdiction a statute of similar import. This statute requires that partnership books as such must be kept in due form with an account of all the business transacted, and requires an inventory and a capital account. Mr. Ruppe testifies that the defendants in error never had a book meeting these requirements. (Tr. 234.) I do not contend that

the absence of such books as are required by this statute would be a bar to recovery by a partnership, if the right of recovery be supported by proper and independent evidence, but I do submit that a partnership may not ignore the requirements of the statute in keeping a record of its transactions, and then be permitted to use as evidence a record which falls short of such requirements. The point was distinctly called to the attention of the trial court (Tr. 283) and was insisted upon in the Supreme Court of New Mexico (Tr. 466), but the latter court took no note of it. Other portions of this same statute not involved here, have been before the Supreme Court of New Mexico (Gillett v. Chaves, 12 N. M. 353); but the section relied on here has never been construed by that court. Not having found a similar statute elsewhere, I have been, of course, unable to find an adjudicated case construing this language, but the principle invoked can be abundantly supported.

Deserant v. Cerillos Coal Co., 178 *U. S.* 409.

I deem it unnecessary to cite authority to support the proposition that if the book offered was a part of a set of books, it was incumbent upon the party offering it to offer the entire set, nor that it was incumbent upon defendants in error to satisfactorily explain the mutilations and era-

sures in the ledger.

The evidence as to the prevailing rate of interest in New Mexico was erroneously admitted. The witness Ruppe was permitted to testify that the ordinary rate of interest which money was earning in Albuquerque during that period was ten per cent. (Tr. 197.) My contention is that there is but one rate of interest in New Mexico, in the absence of a written contract, and that rate is six per cent. The statute is as follows:

> "Sec. 2550. The rate of interest, in the absence of a written contract fixing a different rate, shall be six per cent. per annum, in the following cases:
>
> First. On money due by contract.
>
> Second. On judgments and decrees for the payment of money when no other rate is expressed.
>
> Third. On money received to the use of another ,and retained without the owner's consent expressed or implied.
>
> Fourth. On money due upon the settlement of matured accounts from the day the balance is ascertained.
>
> Fifth. On money due upon open account, after six months from the date of the last item."

Comp. Laws of New Mexico, 1897.

I take this to be a legislative declaration that the value of the use of money in New Mexico is six per cent per annum and that no person can be held to pay a higher rate in the absence of a

contract in writing to do so.

Another statute bearing upon the matter is as follows:

> "Sec. 3219. The jury on the trial of any issue or inquisition of damages may, if they shall think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure."
>
> *Comp. Laws of New Mexico*, 1897.

If under these statutes juries are not confined to a rate of six per cent per annum in awarding damages in the nature of interest, then there is no limit to the amount which a jury may add by way of damages for interest. When I come to discuss the charge of the court I shall demonstrate the prejudicial effect of this testimony.

> *Parker v. Nickerson*, 137 Mass. 487.
> *Rochester v. Levering*, 4 *N. E.* 203.
> 2 *Suth. Dam.*, *s.* 355-366.

If none of these objections were well-founded, I submit that books which contain nothing to show the amount of merchandise purchased, or expense of conducting the business, and no data which would enable a bookkeeper or a person versed in accounts to ascertain the profits of the business,

or to test the accuracy of the statements of the witness upon these points, could not possibly corroborate or supplement the testimony of the witness, and that the effort to prove the amount of cash receipts by these books added nothing whatever to the testimony of the witness Ruppe; that in legal effect his testimony did not differ at the last trial from that which was under review by the Supreme Court of New Mexico in 1909, and that this evidence did not meet the requirements of the authorities; that it added nothing to the speculations and estimates of the witness Ruppe, and should not have been submitted to the jury.

There are many cases in which the character of evidence necessary to sustain a claim of this character has been under discussion by the courts, from some of which I quote and others of which I cite without quotation.

> "Testimony of this character is nothing but conjecture, and it presents no substantial evidence to make certain the profits that were lost, if any. Expected profits are, in their nature, contingent upon many changing circumstances, uncertain and remote at best. They can be recovered only when they are made reasonably certain by the proof of actual facts which present data for a rational estimate of their amount. The speculations and conjectures of witnesses who know no facts from which a reasonably accurate estimate can be made from no

better basis for a judgment than the conjectures of the jury without facts. The plaintiff in this case had his bank account at his command, which would certainly have given him some indication of the volume of his business before and after the interruption of which he complained. He had his ledger, in which he testified that he had entered the charges of the coal which he had sold on credit. The bank account and the ledger account together, if properly kept, would have given at least an approximate statement of the value of the coal which he handled, because one would have shown his cash receipts, the other his charges for coal sold on credit, and the payments he received for that coal, and a careful comparison of the two would have enabled any intelligent bookkeeper to at least approximate the value of his business. These books were not produced. The indispensable facts to warrant a recovery of the expected profits of an established business were not established. There was no evidence of the amount of capital in the business, of its expenses or of its income, either before or after its interruption. There were no data for a rational estimate of the profits at any time during the continuance of the business; nothing from which the jury could reasonably infer that the business was profitable before, less profitable, or profitless after, the plaintiff's withdrawal from the club. Much less were there any facts established which made the amount of the expected profits lost reasonably certain.

The interested witness who alone estimated this loss himself testified that he knew no facts from which a rational finding could be made, and his testimony shows that his estimates were nothing but the wildest conjecture. The result is that the verdict is a speculation of the jury, based on the conjectures of an interested witness, unsupported by the proof, or the knowledge of any facts from which the plaintiff's loss, or its amount, could lawfully or rationally be inferred, and it cannot be sustained."

Coal Co. v. Hartman, 111 *Fed.* 96, 102-3

"The truth is that proof of the expenses and of the income of the business for a reasonable time anterior to and during the interruption charged, or of facts of equivalent import, is indispensable to a lawful judgment for damages for the loss of the anticipated profits of an established business."

Ibid. 99.

"The Belt Line Company operates an electric railway in the city of Bristol, which contains about 12,000 inhabitants. It purchased machinery to be delivered on the 15th day of May. The delivery was delayed, and by that delay it claims that it suffered damages, which it now seeks to set off against the purchase price of the machinery. The proof offered to maintain this plea is the number of fares received by the road on 5 consecutive

days in May, immediately preceding the suspension of traffic, and on eight consecutive days in June, from the 23rd to the 30th, inclusive, after its operations had been resumed. During those 13 days the evidence tends to show that the Belt Line Company received in fares $449.15. We are asked to assume that its gross receipts during the period of suspension would have been an average of the receipts during the 13 days. This, to start with, is a somewhat uncertain basis for arriving at gross receipts; but, granting that a reasonable certainty may be attained from such data with respect to the gross receipts, how are we to ascertain how much is to be deducted on account of running expenses? The bill for fuel is given, and an estimate of the cost of the skilled labor employed, but profits are not to be arrived at by deducting these items from the gross receipts. There are many other charges incident to the operation of an electric railway which must be deducted from gross receipts in order to ascertain the profits in the business, with respect to which the evidence affords us no means of making an estimate. We are not permitted to indulge in conjecture, but it is the duty of the Belt Line Company, which, with respect to the set-off it claims, occupied the attitude of a plaintiff, to fix the amount of recovery by evidence which would show either directly the items of damage which it sustained, or establish facts from which the court could deduce with reasonable certainty the amount of such damages. We think

it highly probable that plaintiff in error sustained damage for which it ought to be compensated, and we regret that the proof is too speculative and conjectural to enable us to fix with a sufficient degree of certainty upon a definite sum as the amount of the damage sustained."

Railway Co. v. Mfg. Co., 44 *S. E.* 893.

"Ordinarily, the problem as to a matter of fact in a law suit is as to whether a certain thing in dispute has happened. Here the problem is as to whether a certain thing would have happened had not a certain other thing not have happened. In the one instance the problem is as to what is the fact; in the other, as to what in a certain assumed past contingency would have been the fact. In the nature of things it seems hardly possible for one to attain to as certain a degree of persuasion in the latter instance as in the former. What has happened may have been witnessed, and is likely to have left traces behind it. No such sources or factors of reasoning exist as to what has not happened. Yet, it is possible to reach a certain degree of persuasion as to whether a certain thing would have happened had a certain other thing not have happened. And the proper administration of justice sometimes requires that where a certain degre of persuasion is attained as to such a thing in question in a law suit that it be acted on. This happens particularly where the question relates to the matter of damages.

> But here, as where the problem is as to what has happened, there must be factors of reasoning, something from which an inference can be drawn, something that has 'rational potency' or 'probative strength,' something that tends to establish that the thing in question would have happened had the other thing not have happened. We are not concerned here with the degree of persuasion that must be attained to in order to justify action thereon, only with emphasizing that there must be something tending to some degree at least to persuade. *A mere guess or conjecture as to what would have happened will not do. All speculation in regard to the matter must be excluded.*"
>
> *McSherry Co. v. Dowagiac Co.*, 160 Fed. 948, 952.

At a very early day Mr. Justice Greer, speaking for this Court, said, with reference to such damages:

> "Actual damages must be actually proved, and cannot be assumed as a legal inference from any facts which amount not to actual proof of the fact. What a patentee 'would have made, if the infringer had not interfered with his rights,' is a question of fact and not 'a judgment of law.' The question is not what speculatively he may have lost, but what actually he did lose. It is not a 'judgment of law' or necessary legal inference, that if all the manufacturers of steam engines and locomotives, who have built

and sold engines with a patented cut-off, or steam-whistle, had not made such engines, that therefore all the purchasers of engines would have employed the patentee of the cut-off, or whistle; and that, consequently, such patentee is entitled to all the profits made in the manufacture of such steam engines by those who may have used his improvement without his license. Such a rule of damages would be better entitled to the epithet of 'speculative,' 'imaginary,' or 'fanciful,' than that of 'actual.'"

Seymour v. McCormick, 16 *Howard*, 480, 489-90.

In another case, Mr. Justice Swayne said:

"The plaintiff must show his damages by evidence. They must not be left to conjecture by the jury. They must be proved, and not guessed at."

Philp v. Nock, 17 *Wall.* 462.

Mr. Ruppe's testimony shows that his invoices, bank book, check book and checks were destoryed by him after this suit was brought, because he did not know that they would be required in the case. He admits that if preserved they would have furnished the necessary data to verify or refute his estimates of profits (Trans. 243.) The Supreme Court of New Mexico said with reference to this point:

"The defendants insist that the plaintiffs should not have been allowed to put in the testimony they did, as to the loss of profits, because it appeared that the witness Ruppe, after the cause of action had accrued, voluntarily destroyed plaintiff's invoices, check book, cancelled checks and bank pass book. This cause of action accrued June 30th, 1902; the complaint was filed August 26th, 1902, and this case has been before the trial court for hearing four times and before this court three times, and this last hearing was more than eight years after the suit was brought. The witness Ruppe testified that he did not know when the invoices, etc., were destroyed, or by whom, but admits that they were destroyed by his order, but that he never knew that they would be required in the case. The question was then for the judge to determine whether such destruction was compatible with good faith on the part of the plaintiffs. Ruppe said that it was his custom as invoices, checks, etc., accumulated to have them destroyed to get them out of the way. Prof. Wigmore thus states the rule: 'The view now generally accepted is that (1) a destruction in the ordinary course of business, and, of course, a destruction by mistake is sufficient to allow the contents to be shown as in other cases of loss, and that (2) a destruction otherwise will equally suffice, provided the proponent first removes to the satisfaction of the judge, any reasonable suspicion of fraud.' 2 Wigmore Evidence, Sec. 1198. The case of Stur-

gis v. Clough, 1 Wall. 269, is not in point because in that case the 'Libellant withheld the best evidence of his profits made by his boat, which would be found in his own books, showing his receipts and expenditures before the collision.' "

Di Palma v. Weinman, 16 *N. M.* 302, 314-5.

While I am not disposed to deny a large discretion to the trial judge in determining the admissibility of secondary evidence where original evidence has been destroyed, I insist that this is a legal discretion to be exercised in accordance with fixed legal principles. It is not a matter exclusively for determination by the trial judge, nor is it, as I conceive the law, solely a question as to whether the destruction of evidence was or was not done without intentional fraud. While it is probably true that no inflexible rule can be formulated which would be applicable in every case and which would not be subject to exceptions depending upon peculiar facts of particular cases, there appears to me to be no logical reason in support of the admissibility of this testimony in this case. Mr. Ruppe might have supplied from the bank with which he did business much of the data which he had negligently destroyed. He might also have obtained the testimony of merchants from whom he bought his goods, with verified duplicates of the invoices

destroyed. Miller vs. WilkesBarre Gas Co., 206 Pa. St., 254. Having done this, having exhausted every possible avenue for the reproduction or substitution of the destroyed data, it may well be that his unsupported testimony with reference to what could not be thus supplied would be admissible without the violation of any settled legal principle and without danger to the interests of society.

But if it be true that the whole object of judicial inquiry is to ascertain the truth, and that the rules of evidence are fundamentally intended to aid in the accomplishment of that result, no one of those rules is more logical than that which denies to a party to litigation the right to withhold from the consideration of a court the best evidence of which his case is susceptible, if within his power to produce it. This rule is of ancient origin and is grounded on obvious necessity.

No better illustration, alike of the logic and the necessity of the rule, can be imagined than that presented by the record now before this Court.

Withing ascribing to defendant in error Ruppe an intention to suppress evidence which might militate against him and to fabricate evidence in his own favor, I submit that the case at bar demonstrates that this well established rule may not be relaxed when the matter in question is the amount of damages which a plaintiff may recover, without possibility of consequences which no lover of truth and justice can possibly view with equanim-

ity.

It appears by the testimony of the plaintiff Ruppe that when he made purchases of merchandise he received invoices showing the cost and amount thereof. These invoices, if preserved, would have enabled the defendants to test the truth of his testimony as to the amount of merchandise sold. It also appears from his testimony that he had a bank book and a check book and checks which, if preserved, would have shown the amount of money deposited by him in the bank, the amount of, the purposes for which and the times at which the same was drawn out. This also would have enabled the defendants to test the truth of his testimony.

Without some knowledge of the amount of merchandise purchased, and its cost, it is impossible to make an intelligent guess as to the amount of profits. These invoices were voluntarily destroyed after the right of action accrued and after the suit was brought, according to his own testimony, and he was permitted to substitute his estimate of 40 per cent of profits upon gross sales for this definite data. Again, his bank account, with his checks and check books, which were likewise voluntarily destroyed, would have furnished most convincing proof as to the amount of his sales and expense and would strongly have corroborated his testimony if true, but would have destroyed it if false. He testifies in effect that he never expected

to be called on to produce these papers, and upon that statement is permitted to substitute for the papers his unsupported evidence whereby the application of the rule invoked is suspended and its purpose frustrated.

The question here presented for determination by this Court is: Assuming Mr. Ruppe to be the most upright and conscientious of men, is it safe to establish a rule of evidence which would open the way for the perpetration of frauds such as would be possible of accomplishment by a dishonest man in his situation?

I cite below a number of authorities on this proposition. Some of these rigidly enforce the rule invoked. Others relax it by the introduction of exceptions, whilst still others appear to make the admissibility of such evidence depend upon the plausibility of the statement by which the destruction of documents is supported. In no case that I have been able to find has the rule been relaxed to the degree which was permitted in the case at bar, and I submit that cases which support any relaxation of the rule are not well reasoned.

2 *Wig. Ev.*, *s.* 1198 *et seq.*
Broadwell v. Stiles, 8 *N. J. L.* 58.
Joames v. Bennett, 87 *Mass.* 169.
Parker v. Kane, 4 *Wisc.* 1; 65 *Am. D.* 283.
Wallace v. Harmstad, 41 *Pa. St.* 492.

Riggs v. Taylor, 9 *Wheat.* 483.
Adms. of Price v. Adms. of Tallman, 1 *N. J. L.* 511.
Wykcoff v. Wykcoff, 16 *N. J. Eq.* 401.
Wilke v. Wilke, 28 *Wisc.* 298.
Bagley v. Adms. of McMickle, 9 *Cal.* 430.
Gugins v. Van Sorder, 10 *Mich.* 522.

But this court has never committed itself to the proposition that such damages are recoverable.

Other evidence, seriously prejudicial to the rights of plaintiffs in error, was erroneously admitted. The matters which I desire specifically to call to the attention of the Court under this proposition are set forth in assignments of error Nos. 1, 6, 7, 8, 34, 35, 36, 37, 38, 39, 40, 51, 52, 53, and 63.

With reference to a part of this testimony, the Supreme Court of New Mexico said:

> "7. Counsel for the defendants assigns error to the admission by the trial court, of the testimony of the witness Ruppe, as to the relative desirability of the place to which the plaintiffs moved, as compared with the Weinman building. They say that such testimony was clearly opinion and should have been excluded. Admitting that such testimony was purely opinion, yet we still think the evidence was admissible, in view of the fact that the witness had lived in Albuquerque thirty years, during which time he was employed in, or conducted a drug

store; that he and Di Palma had been in business since 1894 in Albuquerque, or for a period of sixteen years at the date of the trial, and that he had occupied all three of the locations. Surely, if the rule, which requires those who testify as to the value of real estate, to qualify themselves by proof of knowledge of market value, derived from sales and purchases, does not apply to the owner of lands who has purchased and used them for himself, because his purchase, his ownership and his use qualify him to give an estimate (Union Pac. Ry. v. Lucas, 136 Fed. 374; 69 C. C. A. 218), the witness Ruppe was qualified to give an estimate of the relative desirability of the locations in question. In any event, the question as to whether the witness Ruppe was qualified to give his opinion was for the trial judge to determine and his decision, not being clearly erroneous as a matter of law, will not be disturbed. Stilwell & B. Mfg. Co. v. Phelps, 130 U. S. 520.

8. The plaintiffs were permitted, over objection, to interrogate the witness La Driere as to whether he had prior to the commencement of the excavation, drawn plans of a building for Barnett which was intended to cover both lots. Though the answer of the witness was favorable to the defendants, they complain that even in allowing the question to be propounded, the court committed error, because it showed a deliberate purpose, on the part of the plaintiffs, to create in the minds of the jury the impression that, even before the party wall agreement was

made, the defendants contemplated the construction of a building on both these lots, and thus to induce them to infer that defendants, at that time, contemplated the destruction of the building occupied by plaintiffs, and therefore such destruction was malicious. For the reason (a) that the question, even if improper, was rendered harmless by an answer favorable to the defendants, and because (b) the verdict does not show but that the jury gave plaintiffs a verdict for compensatory damage only, this assignment of error is held to be bad."

Di Palma v. Weinman, 16 *N. M.*, 302, 315-6.

But neither of the cases cited by that court lends any support, when properly understood, to the point decided.

The effect of the testimony must have been seriuosly prejudicial. The tendency of the questions propounded to La Driere, of which complaint is made, was to create in the minds of the jury the inference that prior to the commencement of the excavation on lot No. 1 La Driere had drawn for Barnett plans for a building which was intended to cover both lots, and while it is true that La Driere by his answers denied that any such plans had been drawn, the whole examinations shows a deliberate purpose to create in the minds of the jury the impression that Barnett, even before the party-wall agreement was made, contemplated the

construction of a building to cover both these lots, and from this to have the jury infer that Barnett at that time contemplated the destruction of the building occupied by defendants in error, with or without their consent. There was no suggestion of any right to punitive damages in the case, and therefore the effort to create this impression was unjustifiable and prejudicial.

4 *Sutherland Dam.*, 1030-33.
3 *Wig. Ev.*, *sec.* 1725.

The evidence of Mr. Ruppe's efforts to find another location was intended to fortify the claim for loss of profits, but the effect of it was to permit Mr. Ruppe to express his opinion upon various matters as to which opinion evidence was not admissible, and to put before the jury Mr. Ruppe's views with reference to collateral matters which the jury could not properly consider and which were of no probative value. If the loss of profits depended upon proof of these matters, upon which Mr. Ruppe was permitted to express an opinion, then such lost profits were not recoverable because they are too speculative, uncertain and too remote, and depend upon proof of things which are not susceptible of proof.

"Recovery was sought for two elements of damages—one for injury to the property of the plaintiff, which suffered

loss and deterioration by the removal; and one for injury to his business. With respect to the latter, the plaintiff was permitted to prove that after his eviction he resumed his trade in a location something more than two blocks distant, near the corner of Farnham and Seventeenth streets, and to testify as to the comparative volume and profitable character of his business in the two localities. The court instructed the jury that, if they found the eviction had been wrongful, they should 'determine from the evidence what was the amount in value of the decrease in the plaintiff's business by reason of his removal from said premises. Said loss is to be measured at the time of said eviction. But the jury may take into consideration his earnings in his new location, in connection with all the other testimony, in order to determine the loss of business caused plaintiff by said eviction.' No evidence was offered for the purpose of showing the value of the leasehold estate of which the plaintiff was alleged to have been deprived. We think the measure of damages adopted by the court was too remote and speculative. If it could be sanctioned in such a case, a variety of collateral matters would have to be taken into account, which would carry the investigation too far afield, and call for a multitude of difficult discriminations, with which courts and juries are not competent to deal. It would require it to be known whether the new location was one which, considered by itself, was suitable at all, and, if at all,

to what degree, for the conduct of the plaintiff's business; whether there were other available situations more or less suitable for the purpose than the one chosen; and whether the plaintiff had exercised reasonable care, prudence and judgment in making his choice. Account would also need to be taken of the seasons of the year between which the comparisons were made, and of the general volume of trade, and of the prevailing degrees of business prosperity. Manifestly, an investigation of this character would be well-nigh interminable, and the speculations to which it would give rise could eventuate in no definite conclusion."

Karbach v. Fogel, 88 *N. W.* 659, 660.

The admissibility of these opinions must be determined upon the principles applicable to the admissibility of the opinions of non-professional witnesses, rather than those which govern the admissibility of testimony of experts, but it is perfectly clear that they were not admissible under either, and that the trial court was not at liberty to say, as a matter of law, that Mr. Ruppe, or any other witness, could give his opinion about such matters.

3 *Wig. Ev., sec.* 1917 *et. seq.*
Rogers Exp. Tes. s. 1 *et seq.*
Ferguson v. Hubbell, 97 *N. Y.* 507.
Pearson v. Alaska Co., 99 *Pac.* 753.

Schmieder v. Barney, 113 *U. S.* 645.
Milwaukee Ry. Co. v. Kellogg, 94 *U. S.* 469.
Franklin Fire Ins. Co. v. Gruver, 100 *Pa. St.* 266.

Counsel was also permitted, over the objection of plaintiffs in error, persistently to propound questions to the witness Ruppe, which suggested the answers desired and which violated settled principles to such a degree as amounted to an abuse of discretion by the trial judge. While I concede that the trial judge must be permitted a very large discretion in these matters, I submit that in this case a manifest abuse of discretion is shown.

1 *Wig. Ev., Sec.* 768 *et. seq.*
Southwestern Bry. Co. v. Schmitt, 226 *U. S.* 162.

I disclaim any purpose in this discussion to present the question of the weight of any part of this evidence, which was of course for the jury alone, but I do earnestly urge that error of law was committed in permitting the jury to consider any of the evidence of which complaint is here made. and that it is no answer to this argument to say that defendants in error could not furnish any better evidence than that which was thus erroneously admitted. I have shown that by the use of proper

diligence they might have preserved legal evidence of their loss. If they failed to do so, it is their misfortune and not the fault of plaintiffs in error.

II.

THE CONSTRUCTION OF THE PARTY-WALL DID NOT NECESSARILY INVOLVE A TRESPASS.

It appears to have been assumed by the counsel for the plaintiffs and by the trial court that an excavation beneath the surface of Lot No. 2, even though it did not in any manner interfere with the possessions of the plaintiffs, constituted a trespass, but I submit that this is not the law. While I have found no case in which the exact point has been adjudicated, several cases decide that a landlord may lawfully contract for the construction of a party-wall, notwithstanding the right of the tenant to occupy the building, but may not lawfully disturb the possession of the tenant thereby, and if, in the construction of the party-wall, the possession of the tenant be disturbed, the landlord is liable in damages. (Northern Trust Co. v. Palmer, 49 N. E. 555.) La Driere was not permitted to testify as to the feasibility of constructing the party-wall without interference with the possession of the tenants. (Tr. 312.)

session of the tenants. (312.)

Of course any entry by a landlord during the term of the lease, where a right of entry is not re-

served, which disturbs the possession and enjoyment of the tenant, is a trespass, but I have found no case which holds that an excavation beneath the surface, which did not in any way disturb the actual possession of the tenant, is a trespass. The point I seek to make is, that unless some act of the plaintiffs in error resulted in a disturbance to the possession of the defendants in error, the mere fact that an excavation was made on lot No. 2 does not render them liable.

It will hardly be contended that if this party wall had been constructed in a manner contemplated and the east wall of the building of the defendants in error had not fallen, they would have had any right of action against the defendants for a tort or against their landlord for a breach of the implied covenant for quiet enjoyment.

In paragraph 13 of the charge the court told the jury:

> "You are further instructed that the defendant, Weinman, had no lawful right, without the consent of the plaintiffs, to go upon lot 2 if it was occupied by the plaintiffs as his tenant under the lease in evidence, and to erect a wall on the line between said lot 1 and 2, a part on each lot, or to tear down the wall or any portion thereof, of the building so occupied by the plaintiffs, and that he could not give the defendant Barnett any lawful right to do that which he, the defendant Weinman, had not the right to do." (Tr. 425.)

This instruction seems to be in direct conflict with paragraph twelve of the charge of the court, which is as follows:

> "You are further instructed that the party wall agreement offered in evidence by the plaintiffs in this case was a contract which the defendants might lawfully enter into between themselves, and of which the plaintiffs would have no right to complain unless they were injured by something done in pursuance thereof, and that there is no presumption that anything done in pursuance of said party wall agreement did injure the plaintiffs, and the plaintiffs are bound in law to establish their case, and the cause of the injuries inflicted on them by the same degree of proof that would have been necessary if no such party wall agreement had ever been entered into between the defendant, that is, by a preponderance of the evidence." (Tr. 424.)

The cases in which it is held, and they are both uniform and numerous, that the landlord may maintain an action for an injury to the inheritance, notwithstanding the existence of an estate for years in the tenants, are inconsistent with the idea that the rights of the tenant are co-extensive with those of the landlord during the continuance of his estate. Indeed, I regard it as elementary that a tenant can maintain trespass only where there is an interference with his possession, and

that the landlord is the proper party to sue where the trespass results in an injury to the inheritance. In a case which arose in Missouri where the landlord sued a truck man for breaking a window while delivering goods, and where the contention was made that the tenant under a lease, and not the landlord, was the proper party to sue, the court said:

> "Neither is there any doubt that plaintiff Ridge, and not the tenant Taylor, was the proper party to sue for this damage done the freehold. If it was a mere wrong committed against the *possession* then there would be some point to counsel's contention. But, as said by plaintiff's counsel, this is a trespass on the case rather than *quare clausum fregit*, and manifestly the landlord has a right to sue and recover damages done the reversion. Bobb v. Syenite Granite Co., 41 Mo. App. 642."

56 *Mo. App.* 138-9.

If it be true that plaintiffs in error could lawfully enter into the party-wall agreement and could lawfully carry the same into execution, provided nothing were done in pursuance of the agreement which injured the defendants in error as was affirmed in paragraph twelve of the charge, certainly paragraph thirteen was well calculated to mislead the jury and to give them the erroneous idea that they need not too carefully scrutinize the

evidence because the plaintiffs in error had contracted together for the commission of a trespass before the work of excavation was begun.

Northern Trust Co. v. Palmer, 49 *N. E.* 555.
1 *Taylor's Landlord & Tenant, Sec.* 174.
Proud v. Hollis, 1 *B. & C.* 8.
Penley v. Watts, 7 *M. & W.* 601.
Shaw v. Commisky, 7 *Pick.* 76.
Peterson v. Edmondson, 5 *Harr*, 378.

III.

THE CHARGE ON THE SUBJECT OF DAMAGES WAS MISLEADING AND CONFUSING, AND PROPER INSTRUCTIONS ASKED WERE REFUSED.

The court instructed the jury as follows:

> "If you find from a preponderance of the evidence that said defendants committed the acts complained of by said plaintiffs, and you further find that the plaintiffs were damaged thereby, then you will find from the evidence the amount which was the natural and proximate consequence of the said wrongful act of the defendant, and your verdict should be in such amount as will compensate the plaintiffs for the damage suffered.
>
> You are further instructed that in ar-

riving at said amount you may take into consideration the testimony regarding the loss of profits occasioned by the removal to another location, the testimony regarding the value of the stock of merchandise and fixtures destroyed, if any were destroyed, and the testimony regarding the injury and damage, if any, to the remaining stock and fixtures, the testimony regarding reasonable expenses in removing to another location, and the repair of the fixtures and furniture partially destroyed, and the testimony regarding such other items to which it relates, as are the proximate consequences of the acts of the defendants, if you believe from a preponderance of the evidence that the acts of the defendants complained of were the proximate cause of any loss or damage to the plaintiffs.

You are instructed that an established business is capable of injury or destruction, as a house or other material object is, but in the nature of the case it is much more difficult to determine the value of a business destroyed or the amount of damages to it if injured than it is to determine the value of a house or the injury to it. To illustrate, a man may have an established business of growing vegetables for the market and may have customers in his neighborhood who are in the habit of buying of him; he may have a lease of a parcel of land on which he grows the vegetables on which crops will not grow without irrigation. The land may be irrigated from a stream which is the only source from which it could be irrigated.

That stream might be diverted at its source by the work of man or by some convulsion of nature, so that it would be no longer possible to irrigate the land. In that way his business might be wholly destroyed. If he could get other land, not too far from his customers on which he could grow vegetables his business might not be destroyed or even injured. It might cost him something to make the necessary changes, but that would not be injury to his business as such. Injury to the business would consist in loss of trade or greater expense in supplying his customers, or both. To show what the injury to the business was, evidence in relation to the profits before and after the change would be admissible, but would not be alone and in itself conclusive.

If under instructions given you and on the evidence you have heard, you determine that the plaintiffs are entitled to recover damages from the defendants, you should then determine from the evidence the value of the personal property of the plaintiffs, if any, which was wholly destroyed, and in doing that take its market value in Albuquerque at the time, not at retail in the business of the plaintiffs, but the cost to them as apothecaries, to replace the goods destroyed in their stock in Albuquerque, and in determining the damage to plaintiffs, if you find there was any from injury to goods which were not wholly destroyed or lost, you should take the difference, if you can determine it from the evidence, between the market value before the injury of such goods in

Albuquerque, as already explained to you and their value determined in the same way after they were injured." (Tr. 426-7.)

"You are further instructed that in a case like this, it is incumbent upon the plaintiffs to satisfy the jury by a preponderance of the evidence, that they actually suffered damage and of the extent of such damage, if any. Damages which are purely speculative, which depend upon uncertain and changing conditions, or which are not susceptible to proof to such an extent that the jury should be reasonably satisfied that the same was actually incurred, as the proximate result of some wrongful act on the part of the defendants, are not recoverable in this case, and should not be taken into consideration by you in estimating the amount of the plaintiffs' damages, if you allow damages." (Tr. 423.)

These paragraphs of the charge are calculated completely to confuse the minds of the jury as to the true rule of law which governed them in assessing damages. Taking them together, they tell the jury in substance that Mr. Ruppe's evidence is admissible and may be considered by them, but is not in and of itself conclusive, and they are told that damages which are purely speculative, "which depend upon uncertain and changing conditions, or which are not susceptible to proof to such an extent that the jury should

be reasonably satisfied that the same had been actually incurred * * * are not recoverable and should not be taken into consideration in estimating the amount of plaintiffs' damages." To my mind the expression "to show what the injury to the business was, evidence in relation to the profits before and after would be admissible but would not be alone and in itself conclusive," as applied to the facts of this case, was equivalent to authorizing the jury themselves to speculate as to the amount of profits lost, and left them without any safe guide by which to weigh the evidence of Mr. Ruppe. The court refused to give the following instruction:

> "The jury are further instructed that profits made in business are not a proper element of damages; that they are too remote, and the jury should not take into consideration the evidence offered upon the trial of this cause as to the probable profits or the difference that the plaintiffs would have made had the building not fallen and plaintiffs remained in possession thereof, or the difference between such estimated profits and the profits which the plaintiffs claim they did make in the new place of business to which they removed their stock." (Tr. 437.)

And the following instruction:

> "The court further instructs the jury that this is not a suit on the lease against

> the defendant Weinman for a disturbance of the quiet enjoyment of the premises leased to the plaintiffs, but a suit in trespass, and the rights of the plaintiffs as against the defendant Weinman are to be determined just as if Weinman was no party to the lease." (Tr. 438.)

And the following instruction:

> "You are instructed that under the laws of the Territory, a partnership is required to keep their books in due form, with an inventory of their stock and capital, keeping an account of all business they transact, and that if the jury find that such an account has not been kept and presented in this case, that in that case there is no legal evidence of the profits of the plaintiffs upon which a verdict for loss of profits can be sustained." (Tr. 439.)

Under the instructions given, the jury was permitted to find and did find, apparently, in favor of defendants in error the full value of their property destroyed and the profits which they might have earned by the continued enjoyment of the same property, and also allowed them interest on the profits so lost. The allowance of interest I will discuss under a separate head.

Instead of telling the jury that the reasonable value of the goods and fixtures destroyed, with interest in their discretion, and the reasonable value of the unexpired term of the lease with like

interest in their discretion, was the true measure of damages of defendants in error—a measure of damages founded in reason and supported by authority—these very confusing instructions were given. No evidence as to the value of the unexpired term of the lease was offered, and of course the jury were not charged upon that point, nor was there any request to charge. It is impossible to extract from all that is said in the charge on the point of damages the rule which should have guided the jury under the authorities, if the conflicting and confusing part of it could be eliminated, but I insist that there is such a conflict in the various parts of the charge on this subject as renders it practically certain that the jury did not understand and could not extract from the charge any definite rule with reference to the measure of damages.

Karbach v. Fogel, 88 *N. W.* 660.
Hayden v. Florence Sewing Mach. Co., 54 *N. Y.* 225.
Howard v. Stillwell etc. Mfg. Co., 139 *U. S.* 206.
3 *Suth. Dam. (3d Ed.) Sec.* 864.
Shafer v. Wilson, 44 *Md.* 268.
Casper v. Klipper, 61 *Minn.* 353.
Lumber Co. v. Timber Co., 41 *So.* 332.
Silurian Mineral Spring Co. v. Kuhn, 91 *N. W.* 508.

Douglas v. Ohio River R. Co., 41 *S. E.*, 911.
Paquin v. St. Louis & S. Ry. Co., 90 *Mo. App.* 118.
Griffin v. Colver, 69 *Am. Dec.* 718.
Butler v. Collins, 12 *Cal.* 457.
Ft. Pitt Gas Co., v. Evansville Contract Co., 123 *Fed.* 63.
Wehle v. Haviland, 68 *N. Y.* 448.
1 *Sedgwick Dam. (7th Ed.)* 128.
Cincinnati, etc. Co. v. Western, etc. Co., 152 *U. S.* 200.
Central Trust Co. v. Clark, 92 *Fed.* 292.
Dietrich v. Rumsey, 45 *Ill.* 209.

IV.

THIS CASE WAS SUBMITTED TO THE JURY UPON A WHOLLY ERRONEOUS THEORY BOTH AS TO THE RIGHTS OF THE DEFENDANTS IN ERROR AND THE LIABILITIES OF THE PLAINTIFFS IN ERROR.

The court refused to charge the jury, at the request of plaintiff in error Barnett, as follows:

> "The court instructs the jury that the defendant Barnett was not a party or privy to any contract between the plaintiffs and the defendant Weinman in relation to the building and structure mentioned and described in the lease in evidence; that this is not a suit for the recovery of damages growing out of the breach of any contract rights of the plain-

tiffs, but is a suit for wrongs alleged to have been done by the defendants to the plaintiffs." (Tr. 430.)

The court also refused to charge as follows:

"The court further instructs the jury that the plaintiffs claim damages from the defendants for injury to and destruction of personal property, and for an injury to their estate in lot number two, in block sixteen, of the original townsite of Albuquerque, described in the complaint, that the estate of the plaintiffs in the said lot number two in block sixteen, was an estate for years, subject to be terminated by default in payment of the rent reserved by the terms of said lease; that it is admitted by the pleadings that the plaintiffs failed to pay an installment of the rent reserved at the time when the same became due, and the defendant Weinman by reason of such default in the payment of said rent became entitled to re-enter and take possession of the said premises; that the plaintiffs can recover from the defendants, if at all, no damages to their interest in the said real estate which accrued subsequent to the termination of their estate therein as defined in this instruction." (Tr. 432.)

The court, however, did instruct the jury as follows:

"You are instructed that any actual expulsion of the tenants by the landlord or by any person acting by his authority,

> or anything so done which so seriously disturbs the tenant's possession as to compel an abandonment of the premises by them, or which deprives him of their beneficial enjoyment, amounts to an eviction and the rent is suspended from the time of such expulsion or disturbance." (Tr. 425.)

It is admitted by the pleadings that Weinman demanded rent for the month of July, that defendants in error refused to pay same, and because of such refusal Weinman declared the lease forfeited and re-entered and took possession of the premises. It cannot be disputed that defendants in error brought this suit, not upon the covenatns of their lease, but for the alleged tort of the plaintiffs in error and that in their complaint they sought damages for property destroyed, for the value of their leasehold, which was alleged to be one thousand dollars, and for the loss of profits "which the plaintiffs could have continued to make on said premises during the whole of said term." (Tr. 4.)

It is difficult to understand the theory upon which the court refused to give the instructions asked by plaintiff in error Barnett, above quoted, but the theory upon which paragraph four is founded is reasonably clear. It is that by the wrongful act of the plaintiffs in error the liability of the defendants in error to pay rent was extinguished, although a right to recover as damages

all the profits which they could hope to enjoy through the use of the premises for the entire term was created by the same wrongful act.

It is undoubtedly true that assuming that the plaintiffs in error, wrongfully threw down the wall of the building of defendants in error, defendants in error had a right to treat such act as an eviction, to abandon the premises and to recover all damages which were proximately occasioned by the eviction, but it is not true that they continued to be tenants for the purpose of recovery of damages, but not for the purpose of paying rent. On the contrary, the tenant is put to his election to continue as a tenant or to treat his eviction as a breach of the covenant for quiet enjoyment, in which latter event "the right of action accrues at the time the covenant is broken and all damages that have been or will be sustained may be immediately recovered." 3 Suth. Dam. (3d Ed.) Sec. 864. In the case at bar it was entirely misleading to tell the jury that the rent was suspended from the time of the expulsion of defendants in error because all of the parties had concurred in treating the eviction as a termination of the tenancy.

Although in the complaint defendants in error sought to recover damages for the value of the unexpired term of their lease, and for the loss of profits of their business, on the trial they of-

fered no evidence as to the value of the unexpired term of their lease (unless the evidence tending to show loss of profits could be construed as bearing on that question), and the instructions of the court are silent upon that subject.

I take it that it is unnecessary to cite authorities or even advance argument in support of the proposition that as between defendants in error and plaintiff in error Weinman, defendants in error had a right to sue in contract for a breach of the covenant for quiet enjoyment which is implied by the law from the relation of landlord and tenant or to sue in tort as they did, but in either case the measure of damage was the same, and as it will hardly be contended that Barnett could be properly joined as a defendant in a suit on the covenants of a lease to which he was not a party, it must follow that the bringing of this suit was an election by the defendants in error to waive the breach of their contract rights. The great weight of authority supports the contention that by the eviction relied on the relation of landlord and tenant ceased to exist and the rights of the parties became immediately fixed.

> "Generally the question whether acts of the landlord in consequence of which the tenant abandons the premises amount to an eviction, is a question of law, and includes the question whether they constitute proof of the intent. A person is presumed to intend the natural and probable

consequences of his acts; and when the acts of a landlord upon the demised premises are such as naturally and probably exclude the tenant from the possession and enjoyment of the premises, and assert a title in the landlord himself, the law presumes an intent to do so; and, if the natural consequence follows, the acts are said to amount to an eviction. From the physical exclusion of the tenant from the premises the law presumes an intent to evict; and wrongful acts of the landlord upon the premises, which render them permanently unsafe and unfit for occupancy, so that the tenant loses the enjoyment of them, carry with them the presumption of the intent to deprive the tenant of that enjoyment."

Skelly v. Shute, 132 *Mass.* 367, 370-1.

"Assuming that the entry and suit were an unjustifiable attempt to oust the tenant, which, if he had yielded, would have been an eviction and a breach of the covenant, as he did not yield and was never ousted, the entry was at most a mere trespass, for which he might recover nominal damages in a suitable action, but not in his present suit, which, by his declaration, he has elected to treat as an action of contract for breach of covenant."

International Trust Co. v. Schumann, 158 *Mass.* 287, 291-2.

"When the lessee is prevented from

taking possession, or is afterwards evicted by the lessor or any other persons claiming under a paramount title, the general rule of damages in this country is the same as upon executory contracts for the sale of real estate and the covenants for title in conveyances. In those states where the doctrine of Flureau v. Thornhill prevails the purchaser recovers the consideration money and interest, and not the value of the property; he recovers nothing for the loss of the bargain where the sale is made in good faith, and fails by the vendor's inability, without his fault, to give a good title. Following that analogy, the rent reserved in a lease, where no other consideration is paid, is regarded as a just compensation for the use of the premises. In case of eviction the rent ceases and the lessee is relieved from the burden which is treated as equal to the benefit which he would derive from the enjoyment of the property. Having lost nothing, he can recover no damages."

3 *Suth. Dam. (3d Ed.) Sec.* 864.

I do not contend that the doctrine laid down in the last quotation from Sutherland is applicable to the case at bar, but I do contend that it was erroneous and misleading to tell the jury in this case that "the rent is suspended from the time of such disturbance" and to refuse to tell them that the estate of the defendants in error in the land ceased. I submit that if a trespass was committed which resulted in the destruction

of the leasehold interest of the defendants in error, they had a right to recover the value of that leasehold interest and not possible profits which might have been earned if the leasehold interest had not been destroyed.

If Barnett alone without the knowledge or assistance of Weinman had committed a trespass which rendered the premises uninhabitable, that would not have amounted to an eviction nor have affected the liability of defendants in error to pay rent to Weinman. How then can the fact that as the jury evidently found, Barnett and Weinman acted in concert add to Barnett's liability? The whole case of defendants in error for loss of profits seems to be predicated on the theory that their interest in the leased premises continued for the full term of the lease notwithstanding their refusal to pay rent and the consequent forfeiture of their rights as lessees, and that I submit is an erroneous theory; that the true rule is that upon eviction in which they acquiesced by abandoning the leased premises their right to possession at once determined, but they were entitled if the eviction was wrongful to recover the value of the unexpired term. How that value should have been established, it is unnecessary to discuss, as no evidence was attempted to be offered about it and the defendants in error virtually abandoned any claim to recover for the value of the unexpired term.

V.

PARAGRAPHS FOUR AND TWENTY OF THE CHARGE ARE INCONSISTENT WITH EACH OTHER.

I am not able to conclude, upon a careful study of the opinion, that this proposition received any consideration at the hands of the Supreme Court of New Mexico.

On the subject of the burden of proof, the court instructed the jury as follows:

21.

"The burden of proof is on the plaintiffs to establish the material allegations of their complaint by a preponderance of the evidence. That does not mean that they must offer more witnesses, or a greater amount of testimony, but that in your belief the evidence they have offered on any particular subject, much or little, and from one witness or more, must to some extent, outweigh that offered by the defendants on the same subject." (Tr. 427-8.)

4.

"You are further instructed that the defendant Barnett had a right to remove the wall on his own lot, and if you believe *from the preponderance of the evidence* that the wall of the building occupied by the plaintiffs fell, by reason of the removal of the wall next to it, on lot one, belonging to the defendant Barnett,

and not because of anything done or caused to be done by the defendant Weinman on lot two, then you should find a verdict in favor of the defendants." (Tr. 422.)

Paragraph twenty-one is highly objectionable because it fails to tell the jury what are the material allegations of the complaint and also because it contains a confusing attempt to define the meaning of "burden of proof." Taken in connection with paragraph four it is very confusing even if it can be said to be entirely sound. By paragraph four the jury were told that the plaintiffs in error must present a preponderance of the evidence that the wall of the building occupied by defendants in error fell by reason of the removal of the wall next to it and not because of anything done by the plaintiffs in error. Surely it can not be said that the burden of proof was on defendants in error to establish by a preponderance of the evidence that the wall fell because of the wrongful act of the plaintiffs in error and at the same time that the burden of proof was on the plaintiffs in error to show by a preponderance of the evidence that the wall did not fall for the reasons alleged by the defendants in error.

If the jury were unable to find from the evidence what caused the wall to fall their verdict should have been for plaintiffs in error, but these two instructions negative that idea, or at least

are so conflicting that the jury could never have extracted that idea from them. The giving of two or more instructions which are inconsistent with each other is calculated to mislead the jury and leave them in doubt as to the law:

> "The two propositions are wholly repugnant, and can not stand together; and for this reason; if there were no other error in the record, the judgment must be reversed. Where the instructions on a material point are contradictory, it is impossible for the jury to decide which should prevail, and it is equally impossible, after the verdict, to know that the jury was not influenced by that instruction which was erroneous, as the one or the other must necessarily be, where the two are repugnant."

Brown v. McAllister, 39 *Cal.* 573, 577.

> "In view of the peculiar phraseology of the plaintiff's instructions, it is highly probable, if not absolutely certain, that they would mislead the jury, unless the qualification was stated in connection with the instructions themselves. To put the qualification in a separate instruction at the instance of the opposite party, has the appearance to the jury of giving two sets of instructions in conflict with each other, and leaving it optional with them which they will adopt. The instructions should be consistent as a whole, in fact, and with each other, and thereby avoid the probability of mis-

leading. Ordinarily where the whole law of the case is given to the jury, although at the instance of the different parties, this court will not interfere. But the law must not be so given as to present a conflict, or otherwise to mislead the jury."

Hoben v. Railroad Co., 20 *Iowa* 567.

With all deference to the learned trial judge, I submit that it is impossible to reconcile these two instructions or to conclude that the jury were not misled by them.

Haight v. Vallet, 89 *Cal.* 245.
Bank of Metropolis v. New England Bank, 6 *How.* 212.

VI.

THE COURT SHOULD HAVE GIVEN THE CAUTIONARY INSTRUCTION REQUESTED WITH REFERENCE TO THE TESTIMONY OF MR. RUPPE.

That instruction was as follows:

"The court instructs the jury that they are not bound to accept as true the testimony of the plaintiff, B. Ruppe, as to the quantity or value of the property lost or destroyed or injured by reason of the fall of the wall of said building, as testified to by the witnesses, but it is the duty of the jury to determine the amount and

extent of the loss of the plaintiffs, if any, from all of the evidence in the case, and their general knowledge of human affairs, and if the jury believe from the evidence that the plaintiff B. Ruppe has suppressed any fact in connection with the value or quantity of goods lost, or has attempted to exaggerate in any manner the extent of his loss, they have the right to take such fact into consideration in determining the extent of the plaintiff's damages. In no event can the plaintiffs recover in this case a sum in excess of the actual damages suffered and sustained by them, which damage must be directly attributable to some wrongful act on the part of the defendants, and before the plaintiffs can recover any damages against the defendants they must satisfy the jury by a preponderance of the evidence that such damages were occasioned by some wrong on the part of the defendants. It is not sufficient that they shall show that some wrongful act on the part of the defendants might have occasioned the damages." (Tr. 431.)

Refusing this, the court in its charge said to the jury:

"If you believe from the evidence and all of the facts and circumstances in evidence that any of the parties to this cause had it in their power to produce evidence which from its nature would tend to prove with greater certainty any part of their contention, but have failed to do so, you have a right to presume from such

failure that such evidence, if produced, would have made against the contention of the party having the power to produce it and failing to do so.

It is your duty to carefully scrutinize and to dispassionately weigh the testimony of all of the witnesses, giving to the several parts of the evidence such weight as in your judgment they should receive. You are not bound to accept as true any statement simply because it is sworn to by the greater number of witnesses; nor are you bound to accept the testimony of any witness as true, if for any good reason it appears unreliable or untrue. You have no right to reject the testimony of any of the witnesses, without good reason appearing in the evidence, which includes the appearance and manner of the witnesses when testifying as well as what they say.

You are the sole judges of the weight of the evidence, and of the credibility of the witnesses. To determine what weight should be given to the testimony of any particular witness, you should take into consideration his apparent capacity for observing; and remembering and describing what he has seen and heard; his opportunity for knowing that of which he testifies should be also taken into account and you should especially consider whether he has any interest, bias, or prejudice likely to affect his testimony. If you believe from the evidence in this case that any witness has such interest, bias or prejudice you should allow it such weight as you think proper to determine the value of his testimony." (Tr. 428.)

Considering the character of the evidence of the witness Ruppe and that he was the only witness by whom the defendants in error attempted to establish their damages, the refused instruction should have been given. It is is not open to the objection that it singled out and gave undue prominence to the testimony of a single witness. On the contrary it furnished a test whereby the jury could have determined the weight of Mr. Ruppe's testimony.

Ward v. Brown, 44 *S. W.* 488.
Whiteford v. Burckmeyer, 39 *Am. St. Rep.* 640.
Harrison v. Rowan, 3 *Wash. C. C. A.* 580, *Fed. Cs. No.* 6141.
Buerman v. Van Buren, 44 *Mich.* 496.

VI.

PLAINTIFFS IN ERROR ARE NOT LIABLE FOR THE DEFECTIVE EXECUTION OF THE PARTY-WALL AGREEMENT. GRANDE WAS AN INDEPENDENT CONTRACTOR.

Plaintiff in error Barnett asked the court to instruct the jury as follows:

> "The court instructs the jury that if they believe from the evidence that the defendant Barnett employed a competent architect to prepare plans and specifica-

tions for the construction of a building on lot number one, in block sixteen, of the original townsite of Albuquerque, and if the jury further believe from the evidence that the said defendant Barnett employed a competent person to erect a building and make excavations in accordance with the said plans and specifications, and if the jury further believe from the evidence that it was practicable to so erect and construct the said building in accordance to the said plans and specifications without injury to the plaintiffs in this case, then the plaintiffs cannot recover from the defendants, even though the contractor employed by the said defendant Barnett, in the execution of his contract, committed some act which amounted to a trespass upon the rights of the plaintiffs, but the remedy of the plaintiffs, if any, for such trespass, is against the contractor and not against the defendants in this case." (Tr. 431.)

The court refused to give this instruction and instead thereof gave paragraph fifteen of the charge, as follows:

"You are further instructed that if you find from a preponderance of evidence that the defendant Barnett, in pursuance of the contract between himself and the defendant Weinman and without the consent of the plaintiffs, caused excavations to be made on said lot 2, or any portion thereof, either by his agents or servants, or by any independent contractor, then

> both these defendants, Weinman and Barnett, were equally guilty of trespass, and it is immaterial that the parties doing the work were also trespassers because the plaintiffs had the right to sue any one or more of those guilty of trespass." (Tr. 425.)

The court refused to permit plaintiffs in error to show that it was perfectly feasible to build the party wall in the manner contemplated by the plans and specifications and the party-wall agreement, without interference with the possession of the defendants in error of the leased premises, but submitted this case to the jury upon the apparent theory that it had been agreed between Weinman and Barnett that Barnett might throw down the wall of the building of defendants in error, and as if Barnett had employed Grande for that specific purpose. It is undoubtedly true that if the building of the party wall according to the plans and specifications necessarily involved a trespass upon the rights of the defendants in error, then the fact that an independent contractor was employed to commit the trespass would not excuse the plaintiffs in error, but careful scrutiny of the plans and specifications of the party-wall agreement, and of the oral testimony will show, that it was not contemplated by any of the parties that Grande, in the execution of his contract, should even enter the store where the defendants

in error were engaged in business. The specifications required that the wall of the adjoining building should be supported as the excavation was being done. (Tr. 145.) And Grande contracted "to do all the excavation and stone work required * * * in accordance with the plans and specifications." (Tr. 149.)

Let us suppose, for a moment, that the party wall had been constructed, in accordance with the plans and specifications, in such manner that the business of the defendants in error was not interferred with; that the east wall of their building had remained in place, and no goods or property of the defendants in error were injured or damaged in any way. In that event could the defendants in error have sued either Weinman or Barnett or Grande; could they have refused to pay rent, or have claimed that they had been evicted? If they could, I do not understand upon what theory.

Certain it is that the relation of master and servant did not exist between Barnett and Grande, nor was Grande Barnett's agent, but on the contrary, Grande was an independent contractor and was alone responsible, if by his departure from the requirements of the plans and specifications, the injury was inflicted upon the defendants in error.

Casement v. Brown, 148 *U. S.* 615.

Chicago v. Robbins, 67 *U. S.* 418.
Transportation Co. v. Chicago, 99 *U. S.* 635.
Sulsbecker v. Dickie, 51 *How. Pr.* 500.
Norwalk Gas Co. v. Norwalk, 63 *Conn.* 495.
Conners v. Hennessey, 112 *Mass.* 96.
Engel v. Eureka Club, 23 *Am. St. Rep.* 693.
Dillon v. Hunt, 24 *Am. St. Rep.* 374.
Charles v. Rambo, 66 *Am. Dec.* 642 *and note*
Gilmore v. Driscoll, 122 *Mass.* 199.

VIII.

THE INSTRUCTION WITH REFERENCE TO THE RECOVERY OF INTEREST AS DAMAGES IS ERRONEOUS.

The court instructed the jury:

> "You are instructed that if you find the plaintiffs are entitled to any damages, you may take into consideration, if you think fit, the length of time which has elapsed since the damage occurred, and, if you think fit, give damages in the nature of interest over and above the property damages actually suffered by the plaintiffs." (Tr. 427.)

and refused to instruct as follows:

> "....you may, if you see fit to do so, give damages in the nature of interest over and above the value of the goods at the time of the injury, but you are not

bound to do so and you are not at liberty to award to the plaintiffs interest to any other extent or on any other account." (Tr. 433-4.)

I have already quoted under the first point of this brief the statutes upon which I base the contention that in no event could the defendants in error have been allowed to recover more than six per cent interest, and that there could be no interest on anything except the value of the goods at the time of the injury. The prejudicial character of this instruction and of the evidence to which it applied, is demonstrable.

The jury returned a verdict for $5,000 damages and six per cent interest. The court refused to accept this verdict as returned, and sent the jury back under circumstances fully disclosed by the bill of exceptions. Afterwards the jury brought in a verdict for $7,738.00—an increase of 54.7 per cent. The period between the fall of the wall and the rendition of the verdict was 7 years, 9 months and 9 days. An increase at the rate of six per cent per annum for that period would have been 46.6 per cent. The rate of interest is said by the Supreme Court of New Mexico in its opinion to have been 7.15 per cent for this period. The interest on the amount required to be remitted was considerably less than seven per cent for the same period. While the difference is not great in eith-

or case, it is substantial, and if I am right in my contention, sufficient to require this court to order a further remittitur of several hundred dollars, if there be no other error in this record. Under all the circumstances of this case, I think that it may be fairly argued that the jury understood from all that transpired, that they were sent back for the purpose of adding interest to their verdict. I am not disposed to question the right of the trial judge to send the jury back for the purpose of making their verdict plain, if in his opinion it was so ambiguous that no judgment could be rendered upon it; but I submit that it was not thus ambiguous. The words "and six per cent interest" might have been rejected as surplusage and judgment rendered on the verdict for $5,000, which would have borne interest at six per cent from the time of the rendition of the verdict. But if the trial judge thought it was his duty to send the jury back, he should not have permitted the jury to increase their verdict several hundred dollars beyond the amount which, under any theory of the case, they could have intended when they first came into court. But the wall fell on June 30, 1902. The jury presumably found that the defendants in error lost profits for seventeen and one-half months after June 30, 1902, or until December 15, 1903, and this verdict as last returned allowed interest on those anticipated profits, not from the expiration of

the term of the lease, but from the time the defendants in error began to anticipate that they would lose profits. The Supreme Court of New Mexico says that this interest amounts to 7.15 per cent per annum on $5,000 from the time the wall fell. But it overlooks the fact that it has held, as I think erroneously, that all of the damages of defendants in error did not accrue at that time, but the defendants in error continued to suffer damages for seventeen and one-half months thereafter, and we have this very extraordinary result of this action by the Supreme Court of New Mexico. The defendants in error recover the value of the goods which they lost with interest thereon from the time of the fall of the wall; they recover the profits which they would have made on the very goods which the verdict compensated them for, and also interest on those profits, not from the time the profits would have accrued, but from the time when, as I think that court held, the plaintiffs in error became insurers to the defendants in error that they should do business profitably for seventeen and one-half months and be compensated with interest on those profits while they were accruing. With all due respect to the Supreme Court of New Mexico, I feel constrained to say that the opinion of that court on the last review indicates that the case did not receive that careful consideration which its merits warranted.

I respectfully submit that this case should be reversed and a new trial awarded.

NEAL B. FIELD,
Attorney for Plaintiffs in Error.
Albuquerque, New Mexico.

18

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Brief for Defendants in Error

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1913

No. 173

JACOB WHITMAN, ET AL., *Plaintiffs in Error,*

vs.

RICHARD DE PALMA, ET AL., *Defendants in Error.*

OWEN N. MAHON,
FRANCIS E. WOOD,
A. B. McMILLEN,
Attorneys for Defendants in Error,
Albuquerque, N. M.

SUMMARY OF ARGUMENT.

Page.

Statement of facts 1
Rulings complained of 5
Principles involved—summary 12
I. Landlord liable to tenant for trespass 13
(a & b) Contract necessarily contemplated trespass 13
(c) Charges that contract itself was not, but act under it was trespass, not inconsistent 14
(d) Subsequent refusal of tenant to pay rent would not discharge existing liability for tort 15
(e) Barnett and Weinman could not escape liability for trespass by contracting with Grande to commit it 16
II. Profits lost are recoverable as an element of damages 25
(a) Technically accurate books of account not essential proof 38
(b) New Mexico statute of partnership not applicable to matters of evidence. 39
(c) Or reviewable by this court 39
(d) No such objection when evidence received 40
(e) No proof they were partners 40
(f) Point not reviewable because books not in record 40

Page.
III. It was proper to compare new location with one destroyed as business site..... 32
V. Memoranda of articles destroyed shown competent to refresh memory of witness... 41
It was in substance two inventories with intermediate purchases added and sales deducted 42
VI. Intrest was allowable as additional damages 48
(a) Commercial rate 10 per cent was proved as measure to be deducted in determining net profits..... 48
(b) Court not requested to limit interest to 6 per cent..... 48
(c) Statute fixing 6 per cent as rate not applicable to torts..... 48
(d) Does not appear that jury allowed higher rate 50
(e) Preliminary report of jury was ambiguous and not a verdict..... 51
VIII. Paragraph 4 of charge is incorrectly copied in brief and does not conflict with 21. 52
IX. Attempt to prove that injury was planned presents no error..... 55
X. Effort to insert error in record should be held invited error..... 55

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1913

No. 173.

JACOB WEINMAN, ET AL., *Plaintiffs in Error,*

vs.

RICHARD DE PALMA, ET AL., *Defendants in Error.*

BRIEF FOR DEFENDANTS IN ERROR.

OWEN N. MARRON,
FRANCIS E. WOOD,
A. B. McMILLEN,
Attorneys for Defendants in Error,
Albuquerque, N. M.

STATEMENT OF THE CASE.

Defendants in error feel that the summary statement of facts in the opposing brief is so far erroneous as to justify a restatement of the facts and questions presents.

The suit was in tort against the defendants for trespass in having undermined the wall of plain-

tiffs' drug store causing the building to fall, damaging and destroying their stock and fixtures and compelling them to remove to an inferior location with large incidental loss in business and profits.

The evidence supported findings of facts as follows: (References are to folios of record below.)

On and prior to Dec. 15, 1901, the defendant (below) Barnett owned the corner lot number one and the defendant Weinman lot number two adjoining on the west, located on the principal business corner in the city of Albuquerque, New Mexico. A building with adobe walls sixteen inches in thickness occupied and substantially covered lot number two. The plaintiffs (below) had been in possession of this building and lot and on the above date took a new lease from Weinman for a term of two years (f. 128-131) and continued their business as retail druggists therein down to June 30, 1902, when the building fell.

The defendant Barnett contemplated the erection of a building on his lot one and on May 6, 1902, without the knowledge or consent of plaintiffs, entered into a contract with the defendant Weinman whereby it was agreed that Barnett should erect a party wall forty inches wide centering on the line between the two lots, and this contract in addition contained the following provision:

"The party of the first part (Barnett)

> is to be permitted to take down any part of the wall now between said lots one and two which will be necessitated in order to locate the new wall centrally over the line. If in the erection of said wall damage should be done to the building now on lot two through the fault of the party of the first part, the said party of the first part is to pay and to make good to the party of the second part in full for all such damage." (f. 273.)

The east wall of plaintiffs' building was substantially on the line. This contract therefore required Barnett to undermine plaintiffs' east wall in order to carry it out (f. 141). Pursuant to this contract the defendant Barnett proceeded to erect the building, and drawings and details of construction were prepared and laid out by his architect, J. L. LaDriere, calling for an excavation extending 2 feet 6 inches under the east wall of plaintiffs' building. (f. 630-4). Barnett then entered into a contract with one Grande "to do all the excavation and the stone work required in the erection and completion of a base * * * all to be done in accordance to the plans and specifications and as directed by J. L. LaDriere the superintendent." (f. 277.) Grande proceeded under La Driere's direction to excavate the basement leaving a bank or shoulder about two feet in width at the top adjoining plaintiffs' wall, and on June 30th, when the building fell, had commenced excavating for the party wall. The specifications prescribed that the excavation for the party wall

should be made in five-foot sections, leaving successive abuttments of earth of like length between to support the building. (f. 269.) One of these excavations (f. 204) had been made to its required depth of 8 feet (f. 208) extending under the north end of the east wall of plaintiffs' building; the second one 5 feet distant was apparently completely excavated (f. 205), and the third of like dimensions had been started. Another excavation about 50 feet back had also been made (f. 147). While the building was in this condition the foundations under the east wall gave way and fell into the excavations, some 50 feet of the wall itself falling, letting down the roof, destroying plaintiffs' goods and rendering the building untenantable. (f. 864-6.)

The plaintiffs at once removed so much of their stock as could be used to the nearest procurable building but the location was much less suitable and advantageous for the drug business than the one destroyed. (f. 301-2.) They continued to occupy this stand until another, nearer the business center and more suitable, though still inferior to the old stand, was secured, and occupied the latter for the balance of the term of their original lease. (f. 372-3.)

Evidence was offered showing the value of the goods destroyed, the value of damaged goods before and after the injury, the expenses of removal, repairing of damaged fixtures, and profits earned by the plaintiffs during the seven months'

occupancy of the original building and their profits in the places to which they were compelled to remove, indicating loss of profits averaging about $197.00 per month for the 17½ remaining months of the lease, even assuming that the business would cease its previous steady growth. (f. 350-6-7-9-61-70-6-7.) On this basis the evidence sustained the following amount of damage:

Loss on stock destroyed	$ 657.87
Injury to stock not destroyed	500.00
Damage to fixtures and removal expenses	1613.29
Loss of profits	3446.27
	$6217.43

The jury were instructed that they might, if they saw fit, give additional damages in the nature of interest upon the actual loss for the time the plaintiffs had been kept out of their money. Had the jury accepted these figures as testified to and allowed interest at six per cent, they would have warranted a verdict of substantially $9000.00. The verdict returned was for $7738.00. Judgment for the plaintiffs on the verdict was modified by the Territorial Supreme Court by requiring plaintiffs to remit the item of stock damaged but not destroyed as being insufficiently proved, and affirmed the judgment as modified.

Under the above item relating to damaged goods injured but not destroyed the witness Ruppe testified that he made no written list or schedule of

these goods, but gathered them together and had them before him immediately after the injury, and then from his knowledge as a druggist of their value appraised them as worth $800.00 before the injury, and that their wholesale value or what they could be purchased for was $400.00. (f. 331-4.) Upon cross examination he testified that this $800.00 was what the goods would have brought at retail (f. 474), sold in the ordinary course of business, and that he actually sold them for $300.00 their value as damaged goods. (f. 474.)

He was unable to remember any definite list of the articles. In this state of the evidence the trial court charged the jury that the plaintiff might recover the difference between what it would have cost to replace those goods or the wholesale value and the value of the goods as they were after the injury. (f. 306-7.) The Supreme Court of New Mexico ruled that the evidence of Ruppe tistifying generally as to the value of these goods in a lump sum from memory founded on an appraisal in bulk by him after the injury when they had been collected together was insufficient in law to warrant a verdict for that item and required the defendants in error to remit not merely the measure of damages charged by the trial court but the entire sum claimed in the complaint or testified to by any witness with interest aggregating $770.00 This amount being much less than the cost of another trial the defendants in error were forced to submit to the ruling of the court

and accordingly filed the required remittitur. Complaint is now made by plaintiffs in error that they are still damaged by this item though they failed to explain how. The error, if any, we submit was against the defendants in error.

The witness Ruppe showed by his books the cash receipts from his business both before and after the injury daily, monthly and in total amount and then testified as to his manner of marking goods and profits as to the individual items concluding "in my experience as a druggist in figuring the profits that I have made in my business I figured that my business produces me an average of 40 per cent gross" (f. 355) and being interrogated as to what he meant by "figured" testified: "My knowledge of the business permits me to state that I make 40 per cent on my sales." (f. 357.) He testified that the capital invested in the business was between $11,000 and $12,000 and the prevailing rates of interest on money 10 per cent and that his monthly expenses were substantially $434 each month both before and after the injury. The court held that this evidence furnished sufficient basis upon which the jury could determine the amount of profits lost and this action is further assigned as error.

The witness Ruppe further testified that within a month prior to the destruction of his building he had made an inventory of his stock and entered it upon the inventory or stock book kept by him and had subsequently purchased goods on

invoice from time to time; that after the removal of the salvage of his business to temporary quarters he made a list of the property destroyed, in this manner: first consulting the inventory and subsequent purchases and then the memory of himself and his clerks as to whether or not the missing article was still on the shelves when the building fell and whether or not it had been afterwards sold and if the result of this investigation convinced them that the article was in stock when the building fell and not found among the salvage thereafter, it was entered upon the list. The trial court ruled that this method of determining the loss offered a sufficient basis to make a question for the jury. Plaintiffs in error assign this ruling as erroneous and claim that it was the duty of the injured party immediately to make an inventory of his stock remaining and that no other evidence will be accepted in lieu of this inventory.

The list of destroyed articles determined as above stated was entered into the stock book following the injury, some items being added thereto perhaps as long as a month later, and the list thus made up was copied by Ruppe into the bill of particulars filed in this cause. The book itself was present at the second trial, left with the clerk and thereafter could not be found. The witness Ruppe was thereupon allowed to use the bill of particulars in the case copied from that book as proper memoranda with which to refresh his mem-

ory in testifying as to the loss. This action is assigned as error.

Upon cross examination the witness Ruppe testified that his books contained no account of goods purchased and only a portion of his expense account; that he had kept a record of goods bought on credit by putting the invoice on a bill file and when paid removing them from the file to a drawer and as these accumulated they were from time to time transferred to waste paper receptacles and destroyed. That in like manner he had disposed of his returned checks or check stubs. No offer was made by him to prove the contents of these invoices or of the checks claiming that they were matters of needless detail which would serve rather to confuse than to assist the jury in estimating profits. He further testified that he never knew or believed that the items were of any use as evidence in this case; that they were not referred to or called for upon the first and second trials and not until the third trial, eight years after the destruction of the building was any suggestion made that they might be needed; that he then looked for them but had no doubt that they were destroyed as rubbish by his direction. It is now asserted that his action in authorizing the destroyal of these invoices and returned checks and check stubs is such a destruction of evidence as required the court to reject all his books.

The original books, eight in number, have been sent up to this court but no summary, excerpt or

statement of their contents has been preserved or included in the record. Rule 29 of the rules of the Supreme Court of the Territory of New Mexico in force when the bill of exceptions was settled, provided that exhibits of this kind should not be set forth in full but that a transcript or summary statement showing so much of what they did or did not contain as should be sufficient to present to the appellate tribunal such items as were necessary to be considered by it in reviewing the case, and should be agreed upon by the parties or settled by the trial court and included in the record. Plaintiffs in error instead insisted that this excerpt should not be made but that the books themselves must be certified up. The trial judge refused to certify them up holding that so much of their contents as was necessary must be placed in the record in the manner above stated and that the physical appearance of the book was a question of fact addressed to the trial court alone and not subject to review or inspection. These rulings are here complained of.

Subsequently plaintiffs in error procured an *ex parte* order from the New Mexico Supreme Court that the books be sent up and they were accordingly transmitted to that court. Counsel contends in his brief that the opinion of that court showed that they refused to consider these books as not being properly in the record before them, and asserts that action as error.

The court below ruled that defendants in error

having suffered the interruption of a going business by the wrongful act of the plaintiffs were entitled to recover lost profits as an element of damage and were not confined to the difference between the rent reserved and the rental value of the premises for the term as their damages upon that branch. This ruling is complained of.

In the course of the conduct of the trial plaintiffs in error were represented by different attorneys and during the examination of the witness Ruppe upon the question of the books kept and the damages suffered by him and his method of ascertaining property lost, practically every question asked the witness was objected to by one or both of opposing counsel upon various technical grounds resulting in the utmost confusion to the witness and the jury and requiring again and again that the witness' attention be brought back to the point in issue and causing the trial court to permit questions more or less leading and not believed by it to be harmful. These rulings are now assigned as error.

The plaintiffs in error on the trial took 384 exceptions to rulings of the court and have assigned 110 errors upon this review. Most of these now appear to be abandoned. (Brief p. 19.) The lower courts held that certain legal principles, more or less elementary as applied to the case at bar, were controlling in plaintiffs favor. If these principles be approved as sound by this court they will substantially dispose of all the assignments still

relied on. The may be stated as follows:

I.

The owner of leased premises contracting with a stranger to undermine the tenant's wall, becomes liable equally with the stranger to the tenant for resulting damages.

II.

Where a trespass results in the destruction of a building, and consequent interruption of a going business, future profits thus lost may be recovered as an element of damages.

III.

The injured party not only may but must make reasonable effort to minimize the damages. Upon that question evidence is competent to show that he resumed business at the most available site, and its relative value as a business location to the one from which he was ousted.

IV.

It is not indispensable to the proof and recovery of lost profits that a set of account books shall be kept and produced so complete and accurate in themselves that the profits can be ascertained therefrom by computation merely. If the injured party fairly produces the evidence in his possession, written and oral, that together supply data from which profits can be computed with reasonable accuracy they are not to be rejected as speculative.

The contentions advanced in the brief of the

plaintiffs in error may be grouped under the above principles as follows:

I.

The owner of leased premises contracting with a stranger to undermine the tenant's wall, becomes liable equally with the stranger to the tenant for resulting damages.

Plaintiffs in error seem in their brief to concede the foregoing proposition, but seek to differentiate this case by the following contentions. They say: (Brief, page 111, point II)

(a) "The construction of the party wall did not necessarily involve a trespass," and argue thereunder that if the owner digs or authorizes the digging of a tunnel beneath the surface of the lot without disturbing the possession of the tenant there is no liability.

We need not inquire what the result of such hypothetical contract might be because it is not applicable to the facts being considered. The contract entered into by the owner Weinman with the defendant Barnett in this case *required the latter to dig away the surface of the lot* leased by plaintiffs up to and at least *twenty inches under the wall* supporting his building. This excavating was actually done resulting potentially at least, if not necessarily, in the consequences that did ensue, to-wit, the fall of plaintiffs' building. If this be not a trespass then we are at a loss to know how

that term may be defined so as to exclude the act complained of.

(b) They further say under this point: "La Driere was not permitted to testify as to the feasibility of constructing the party wall without interference with the possession of the tenants" and cite page 312 of the transcript. Referring to this citation with what appears on the preceding page, (and it is the only place wherein the question was touched) the court will see that the offer was not to prove that the excavation of the party wall would not of necessity destroy plaintiffs' building, nor was any offer or suggestion made to prove that the work of excavation was not carefully and properly done. Instead they offered to prove that had the plaintiffs' wall "been a solid wall, firm, straight and in line;" (f. 608) in other words, in ideal condition and not as it was; then it would have been possible to have constructed the party wall without necessarily destroying the building. Not only was no objection made to their proving the effects of the contract under the existing conditions, but they were invited to offer such proof, and declined to avail themselves of the invitation. (f. 609.)

(c) On pages 112 and 13 of their brief they contend that the two quoted paragraphs from the charge of the court were in conflict though they omit to explain how. The second paragraph quoted instructs the jury that the mere *making of the contract* between Weinman and Barnett gave the

plaintiffs no cause of action unless something were done under it. The third paragraph instructs them that Weinman had no right, either in person or through the agency of another, to go upon the lot and excavate the soil under the building or tear down the wall. Manifestly there is no conflict between those two propositions.

(d) In point 4 of their brief they seem to contend for the following propositions as applied to the facts of this case:

(1) "That this is a suit in tort for trespass and not on the contract rights under the lease." To this we agree.

(2) That when the building fell as a result of the trespass "the rights of the parties became immediately fixed." (brief 126.) To this we also agree.

But it appears that when the building fell plaintiffs immediately left the premises and occupied other quarters; and that Weinman afterwards had the assurance after having thrown down the building to demand rent, and to claim that by failure to pay this rent they forfeited the right to recover future profits. In other words they contend:

(3) That although the rights of the parties had become fixed so far as those rights depended upon the tort, yet by a subsequent breach of contract between the plaintiffs and one of the defendants both defendants became relieved from the whole or the major part of their liability incurred by

their tort. To state this proposition is to refute it.

(e) In point seven of their brief they contend that because the defendant Barnett instead of himself making the excavation on the plaintiffs' lot required by the party wall agreement, employed Grande to do it "in accordance to the plans and specifications and as directed by J. L. La Driere the superintendent," (f. 277) he thereby relieved himself from the consequences of the act. They attempt to mitigate the apparent absurdity of that proposition by the following statement on page 138: "The court refused to permit plaintiffs in error to show that it was perfectly feasible to build the party wall in the manner contemplated by the plans and specifications and the party wall agreement without interference with the possession of the defendants in error of the leased premises." We have above shown that the court did nothing of the sort, nor was any offer made to prove that fact or that the work as done by Grande was not in all respects skillfully done as required by the plans and specifications; even if we would assume that such fact, if proven, would make the slightest difference in the result.

The Supreme Court of New Mexico upon the second appeal (15 N. M. 68) disposed of these questions upon the basis of the authorities therein cited and reviewed as follows:

> "At the second trial of the case the first proposition was submitted to the

jury and the party wall agreement was introduced and admitted in evidence and the jury by their verdict must have found that the wall in question fell by reason of the excavation under the northeast corner of the building occupied by appellees, which excavation it seems to be conceded, was made by the contractor of the appellant Barnett, under the terms of the party wall agreement between Barnett and Weinman.

The question then arises whether the appellant Weinman, who was the owner of the lot on which the injured building stood, and the lessor of the appellees, became a joint trespasser with Barnett by reason of the license granted Barnett by the party wall agreement. No question as to the breach of the implied covenant quiet enjoyment in the lease between Weinman and the appellees is involved, for this is an action sounding wholly in tort, there being no contractural relations between the appellees and Barnett, and consequently a want of mutuality that precludes any question of breach of contract. In other words, Weinman cannot be held for breach of contract and Barnett for trespass in a joint action and by a joint judgment though a separate action against each might have been maintained.

The relation of landlord and tenant between the appellees and appellant Weinman then is important only because of the party wall agreement between appellants Weinman and Barnett, the former being the owner of the fee of the leased premises, and his liability so far as this case

is concerned, must rest upon that agreement. If his license to Barnett to excavate under the wall of the leased building amounted in itself to a trespass, then he is liable; otherwise it was error to permit a joint judgment against him and Barnett for the alleged injuries to the goods of appellees in the leased premises. The party wall agreement shows on its face that Weinman and Barnett contemplated possible injury to the wall involved in the controversy for by the sixth paragraph of the agreement (p. 67 record) they provided for teh payment by Barnett of such damages as might be done to the building by carrying out the agreement from Barnett's fault, such damages to be paid to Weinman, and while the agreement does not in terms provide that it shall be carried out during the tenancy of the appellees, yet there is nothing therein to the contrary and it was in fact begun to be performed when the wall fell.

A very similar state of affairs to those in the case at bar is set up by the defendants in their answer in Collins v. Lewis, a Minnesota case reported in 19 L. R. A. 822, and the following quotation from the opinion in that case, written by Mr. Justice Collins, seems applicable here:

'It is difficult to understand how the landlord could authorize the performance of the acts provided for in the agreement without fully realizing that a trespass was to be committed, and that his tenant's right to quietly enjoy the premises invaded, unless his consent to the excavation was first obtained. In fact, this in-

vasion was expressly sanctioned, aided and abetted by the agreement and without its execution it is safe to say would not have occurred.

'It is obvious that under a claim of title the landlord has interferred with the tenant's possession of demised premises and has prevented him from having the use and enjoyment of a part thereof.'

The court held that in a suit for rent by the landlord against the tenant, the latter could maintain a counterclaim for the damages sustained by reason of the party wall agreement referred to, on the theory, it is true, of a breach of the implied covenant for quiet enjoyment in the lease, but is it alone upon that theory that appellees might recover?

In Cooley on Torts (2nd ed.) page 104, we find the following:

'Indeed, in many cases, an action as for tort or an action as for breach of contract may be brought by the same party on the same state of facts. This, at first blush, may seem in contradiction to the definition of a tort, as a wrong unconnected with contract; but the principles which sustain such actions will enable us to solve the seeming difficulty.'

And we gather from the distinguished writer that cases where fraud or force enter into such a breach of contract, it may be treated either as a breach of contract or a tort and an action be maintained for either. In the case at bar the party wall agreement amounted to a license or permission to another party to enter the leased premises and to excavate under the wall of the leased building in such a

manner as to greatly endanger the goods and fixtures of his tenants, a fact which Weinman must have known, and it seems to us that under the doctrine that he who commands or approves is equally guilty of with him who performs the act, he was guilty of a trespass in conjunction with Barnett with whom he contracted, permitting him to do the actual wrong. Whitney v. Turner, 1 Scam. 253; Northern Trust Co. v. Palmer, 49 N. E. (Ill.) 555; 28 Am. and Eng. Enc. of Law, (2nd ed.) 566.

In the case of Northern Trust Company v. Palmer, supra, the facts were very much like the case at bar. Hawley the lessor in that case had contracted with the Florsheims, who were adjoining lot owners with the leased premises, to take down and build a new party wall, the tenant's goods were damaged by such demoval of the wall and she brought a joint action against the lessor and the adjoining lot owners for damages.

In that case the Supreme Court of Illinois says:

'Hawley could not, by the contract, without the consent of his tenant Fenton, take down and erect a new wall to the building, the necessary or probably effect of which would be to injure the tenant in her rightful and quiet possession, without being liable, jointly or severally with the Florsheims, the other wrongdoers, for damages.

'In Whitney v. Turner, 1 Scam. 253, the court said: 'The doctrine in relation to trespass is well settled that there are no accessories. All are principals who are

in any wise concerned in the trespass. The person who commands or approves is equally guilty with the one who performs the act.'' Cooley on Torts (2nd ed.) 153; Bishop Non-contract Law, Sec. 522-524.

Both Weinman and Barnett seek to avoid liability on the theory that Grande, the contractor who was excavating for Barnett's building and doing the actual work of excavation at the time the wall fell, was an independent contractor and therefore solely liable for the consequences of his acts.

The contract between Barnett and Grande is set out in the record at pp. 70-71, and so much thereof as is material to this discussion, reads as follows:

'That the said party of the first part, for the consideration hereinafter mentioned, covenants and agrees with the said party of the second part to do all the excavation and stone work required in the erection and completion of a basement to be erected on the southwest corner of Railroad avenue and Second street, in the above said city, county and Territory, all to be done in accordance to the plans and specifications, and as directed by J. L. LaDriere, the superintendent.

The chief consideration which determines one to be an independent contractor is the fact that the employer has no right of control as to the mode of doing the work contracted for. 16 Am. and Eng. Enc. of Law, (2nd ed.) 187; Singer Mfg. Co. v. Rahn, 132 U. S. 518; Railroad Co. v. Hanning, 15 Wall. 649; Comers v. Hennessey, 12 Mass. 96; Forsyth v. Hop-

per, 11 Allen (Mass) 419.

Mr. La Driere was the architect who drew the plans and superintended the construction of the new Barnett building and his testimony was to the effect that he merely saw to it that the excavation was done as provided in the plans and specifications.

But it is immaterial what control over the work was actually exercised by Barnett or his representative, the question is what he might have exercised under the contract with Grande. Campbell v. Lunsford, 83 Ala. 512; Linnehan v. Rollins, 137 Mass. 123.

It is then a matter of construction of the contract as to what power of control was reserved by Barnett over the acts of Grande and his employees, which determines whether Grande was in fact an independent contractor or merely e servant and employee of Barnett.

The contract specifically states that the excavation and stone work to be done by Grande under its terms was to be 'as directed by J. L. La Driere, the superintendent.'

The intent of the parties seems to be clear and unambiguous upon its face. If La Driere, who was unquestionably the agentof Barnett, could direct the work of excavation, he had full power and control over it as to how, when and by what means it should be done. 'Direction means general instructions as to the manner of doing it.' Bershire Woolen Company v. Day, 12 Cush. (Mass.) 128.

Speaking of the contract in Railroad Co. v. Hanning, 15 Wall. 649, Mr. Justice

Hunt says:

'The company have the general control, and it may prescribe where each pile shall go, where each plank shall be laid, where each stringer shall be put down, where each nail shall be driven. All details are to be completed under their orders and according to their directions.'

The cotract in this case seems as broad in its terms. In superintending and directing there is no limitation upon the power of La Driere, so long as he staid within the plans and specifications. He could direct where every stone should be laid and every shovel full of dirt should be taken out. Grande was therefore a servant of Barnett, who though he was to receive a stipulated price for his work, executed it under the direction and superintendence of his employer. Bishop on Non-contract Law, Sec. 602.

But even though Grade were in fact an independent contractor, Barnett would still be liable if the agreed method of excavating under the wall in question worked an injury to the rightful occupant of the building, on the theory that the procurer o fa tort is answerable as doer. Bishop on Non-contract Law, Sec. 604; Carman v. S. & I. Ry. Co., 4 Ohio, St. 399; Palmer v. City of Lincoln, 5 Neb. 136; Gorham v. Gross, 125 Mass. 232; Sturgess v. Theological Ed. Soc., 130 Mass. 414.

In the case at bar the jury must have found under the instruction and from the evidence that the injury was caused as a direct result of the excavation under the wall, which it seems was being done un-

der the plans and specifications furnished by Barnett and his architect. In other words, it is not shown that the contractor of his employes were careless or negligent in excavating, but on the contrary that La Driere, on the very day the wall fell, was seeing to it that the excavation at the northeast corner of the Meinman biulding was being done as per contract." (Record pp. 72-73.)

It is not without interest that the record here being reviewed was made in the court below on behalf of the defendant Weinman by the same party who as judge wrote the foregoing opinion.

In addition to the authorities cited by the court in the above opinion we respectfully call the court's attention to these additional authorities:

Wertheimer vs. Saunders (Wis.) 37 *L. R. A.* 149.
Ellis vs. Sheffield Gas Co., 2 *Ellis & B.* 767.
Robbins vs. Chicago, 4 *Wall.* 679.
Water Co. vs. Ware, 16 *Wall* 576.
Dalton vs. Angus, 6 *App. Cas.* 829.

The Illinois and Wisconsin cases are especially in point on their facts and we invite attention to them accordingly.

POINT II.

Where a trespass results in the destruction of a building and consequent interruption of a going business future profits thus lost may be recovered as an element of damages.

> "The general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed."

Wicker vs. Hoppock, 6 *Wall.* 99.

Allison vs. Chandler, 11 Mich. 542, is the leading case in this country on the question of the right to recover lost profits under the circumstances above stated. For this reason and because of the similarity in the facts we take the liberty to quote it extensively. The court, through Judge Christiancy, said:

> "The law does not require impossibilities and cannot therefore require a higher degree of certainty than the nature of the case admits. And we see no good reason for requiring any higher degree of certainty in respect to the amount of damages than in respect to any other branch of the cause.

The evidence strongly tended to show an ouster of the plaintiff for the balance of the term by the defendant's act. This term was the property of the plaintiff; and, as proprietor, he was entitled to all the benefits he could derive from it. He could not by law be compelled to sell it for such sum as it might be worth to others; and, when tortiously taken from him, against his will, he cannot justly be limited to such a sum, or the difference between the rent he was paying and the fair rental value of the premises, if the premises were of much greater and peculiar value to him, on account of the business he had established in the store, and the resort of customers to that particular place, or the good will of the place, in his trade or business. His right to the full enjoyment of the use of the premises, in any manner not forbidden by the lease, was as clear as that to sell or dispose of it, and was as much his property as the term itself, and entitled to the same protection from the laws. He had used the premises as a jewelry store and place of business for the repairing of watches, making gold pens, etc. This business must be broken up by the ouster, unless the plaintiff could obtain another fit place for it; and if the only place he could obtain was less fitted and less valuable to him for that purpose, then such business would be injured to the extent of this difference; and this would be the natural, direct and immediate consequence of the injury. To confine the plaintiff to the difference between the rent paid and the fair rental value of the premises to oth-

ers, for the balance of the term, would be but a mockery of justice. To test this, suppose the plaintiff is actually paying that full rental value, and has established a business upon the premises, the clear gains or profits of which have been an average of $1,000 per year; and he is ousted from the premises and this business entirely broken up for the balance of the time; can he be allowed to recover nothing but six cents for his loss? To ask such a question is to answer it. The rule which could confine the plaintiff to the difference between such rental value and the stipulated rent can rest only upon the assumption that the plaintiff might (as in case of personal property) go at once into the market and obtain another building equally well fitted for his business and that for the same rent; and to justify such a rule of damages, this rule must be taken as a conclusive presumption of law. The plaintiff in this case did hire another store, the best he could obtain, but not nearly so good for his business; his customers did not come to the new store, and there was not so much of a thoroughfare by it, not one-quarter of the travel, and he relied much upon chance custom, especially in the watch repairing and other mechanical business. This injury to the plaintiff's business was as clearly a part of his damages as the loss of the term itself * * * Now if the plaintiff is to be allowed to recover for this injury to his business, it would seem to follow, as a necessary consequence, that the value of that business, before the injury as well as after, not only might but

should be shown, as an indispensable means of showing the amount of loss from the injury."

In Snow vs. Pulitzer, 142 N. Y. 263, the New York Court of Appeals adopted the rule substantially as axiomatic in a single sentence they say, (page 270):

> "But the principal item of recovery was on account of prospective profits in the plaintiff's business during the remainder of the term of his lease and that they were proper to be considered in estimating his damages in a case like this where he was evicted and his business broken up by the trespass and wrong of the defendant was decided in Schile vs. Brokhahus 80 N. Y. 614."

In 3 Suth. on Damages at 154 it is said:

> The suspension of a profitable business, even if it can be re-established elsewhere involves a loss of the gains which would be made in the interval; the expense of the change, and if a good will has been created, that will be in some measure, if not wholly, lost by the removal to a different place. The objection usually made to the allowance of damages for the loss of profits, when they are disallowed, is that such damages are remote and uncertain or speculative. They are not remote when the premises were leased for the particular business, and the action is against the lessor or his successor in interest, by the lessee or his assignee, whether the action is on the cove-

nant for quiet enjoyment or in tort; *nor are they remote to a wrongdoer who destroys or impairs a business* open to his observation."

In 1 Sedgwick on Damages (8th Ed.) Sec. 182 it is said:

> "Where it clearly appears that the defendant has interrupted an established business from which the plaintiff expected to realize profits, the plaintiff should recover compensation for whatever profit he makes it reasonably certain he would have realized."

The author then quotes with approval the following from Chapman vs. Kirby, 49 Ill. 211, 219:

> "We all know that in many, if not all, professions and callings, years of effort, skill and toil are necessary to establish a profitable business, and that when established it is worth more than capital. Can it then be said, that a party deprived of it has no remedy, and can recover nothing for its loss, when produced by another? It has long been well-recognized law, that when deprived of such business by slander, compensation for its loss may be recovered in this form of action. And why not for its loss by this more direct means? And of what does this loss consist, but the profits that would have been made had the act not been performed by appellants? And to measure such damages, the jury must have some basis for an estimate, and what more reasonable than

to take the profits for a reasonable period next preceding the time when the injury was inflicted, leaving the other party to show, that by depression in trade, or other causes, they would have been less? Nor can we expect that in actions of this character, the precise extent of the damages can be shown by demonstration. By this means they can be ascertained with a reasonable degree of certainty."

To the same effect in substance are the following authorities among others:

Wood Landlord & Tenant, 782.
Show vs. Hoffman, 25 *Mich.* 162.
Hawthorne vs. Siegel, 22 *A. S. R.* 291.
Anvil Min. Co. vs. Humble, 153 *U. S.* 459.
Shafer vs. Wilson, 44 *Md.* 268.
Seyfert vs. Bean, 83 *Pa. St.* 450.
Glass vs. Garber, 55 *Ind.* 336.
Gibson vs. Fisher, 68 *Ia.* 29.
Gobel vs. Hough, 26 *Minn.* 252.

It is not entirely clear from their brief whether plaintiffs in error had not intended to abandon their claim insisted on in the lower courts that future gains prevented can not be recovered as an element of damages where a going business has been destroyed by tort. In their summary of points on page 15 they assert, however, that the proper measure of damages on this branch of the case was the difference between the rent reserved

and the rental value of the premises. The answer to this contention is well expressed in the opinion of the Michigan court in the case above cited, as follows:

> "To confine the plaintiff to the difference between the rent paid and the fair rental value of the premises to others for the balance of the term would be but a mockery of justice. To test this suppose the plaintiff is actually paying that full rental value and has established a business upon the premises the clear gains or profits of which have been an average of $1000.00 per year and he is ousted from the premises and this business entirely broken up for the balance of the time can he be allowed to recover nothing but six cents for his loss. To ask such a question is to answer it."

We suggest also that the general principle is that a tenant during the term of his lease is entitled to the full beneficial enjoyment of the premises that the owner would be entitled to. Suppose the owner and not the tenant was conducting a profiable business upon the premises which was interrupted for a year by a tortious destruction of his building would his measure of damages be the reasonable rental value of the destroyed building for the year or the actual loss of profits which he sustained by the interruption of his business.

In other words is the law so solicitous of the welfare of the wrong doer who destroys his neigh-

bor's building that it puts upon the injured victim the burden of bearing all those damages, concededly resulting from the wrong, that cannot be demonstrated and measured with mathematical certainty. Such in substance is the rule for which the learned counsel for the plaintiffs in error is here contending.

If this be still their contention we respectfully submit that it is unsupported either by authority, reason or justice. Their principal contention, however, upon this branch of the case seems to be that assuming lost profits to be recoverable there was no competent evidence on which to base a verdict. We discuss this proposition under Point IV post.

POINT III.

The injured party not only may but must make reasonable effort to minimize the damages. Upon that question evidence is competent to show that he resumed business at the most available site, and its relative value as a business location to the one from which he was ousted

Counsel for plaintiffs in error indulges in considerable criticism of the trial court for having permitted the witness Ruppe to testify that after the building fell he sought the best quarters then available to continue the business and later when a better location was secured removed to that for the balance of his leasehold term; but that both

locations were inferior to the one from which he was ousted. He showed that the building which fell was on the chief business corner (f. 304) in Albuquerque, New Mexico, then a small city of a little over 6000 souls as appears by the Federal census of 1900. It is common knowledge that the difference of a block in location in such a city is frequently the difference between the center and the suburbs of a large city for business purposes. He showed that before the trespass he was enjoying a profitable and steadily growing business. That immediately afterwards the business showed an abrupt decrease though the stock, help and expense remained the same. He testified that from a business acquaintance with the city of Albuquerque of 30 years standing he knew that the location to which he was forced to remove was much inferior to the one from which he was ousted and that business conditions generally in the city remained the same or were better but nevertheless showed from the records of his business a serious and sustained falling off.

This evidence showing the efforts of the plaintiffs below to secure a new stand and in conducting their business and the results of such effort were not directed, as counsel seems to assume, to establishing the amount of profits which plaintiffs below would have made had they not been ousted. On the contrary this evidence goes to the point that they did everything in reason in their efforts to offset and minimize the damages occasioned by

the tort.

It may be that defendants in error might have rested on merely proving that they continued in business at another place and the result leaving it to their opponents to criticise the place selected as unjustified, but they surely were not harmed by the contrary course.

Inasmuch as plaintiffs in error offer no evidence nor do they make any contention that defendants in error left undone any possible thing upon this point; evidence directed to it, even though erroneously received, would necessarily be harmless: but we respectfully submit that under the decisions in all of the cases above quoted such evidence was competent and properly received.

Upon this point the Supreme Court of New Mexico in affirming the judgment said:

> "Counsel for the defendants assign error to the admission by the trial court, of the testimony of the witness Ruppe, as to the relative desirability of the places to which the plaintiffs moved, as compared to the Weinman building. Teby say that such testimony was clearly opinion and should have been excluded. Admitting that such testimony was purely opinion, yet we will still think the evidence was admissible, in view of the fact that the witness had lived in Albuquerque thirty years, during which time he was employed in, or conducted a drug store; that he and Di Palma had been in business since 1894 in Albuquerque, or for a period of sixteen years at the date of the trial, and

that he had occupied all three of the locations. Surely, if the rule, which requires those who testify as to the value of real real estate, to qualify themselves by proof of knowledge of market value, derived from sales and purchases, does not apply to the owner of lands who has purchased and used them himself, because his purchase, his ownership and his use qualify him to give an estimate (Union Pac. Ry. v. Lucas, 136 Fed. 374; 69 C. C. A. 218), the witness Ruppe was qualified to give an estimate of the relative desirability of the locations in question.

In any event, the question as to whether the witness Ruppe was qualified to give his opinion was for the trial Judge to determine and his decision, not being clearly erroneous as a matter of law, will not be disturbed. Stilwell & B. Mfg. Co. v. Phelps, 130 U. S. 520.

POINT IV.

It is not indespensable to the proof and recovery of lost profits that a set of account books shall be kept and produced, so complete and accurate in themselve, that the profits can be ascertained therefrom by computation merely. If the injured party fairly produces the evidence in his possession, written or oral, that together supply data from which profits can be computed with reasonable accuracy they are not to be rejected as speculative.

To establish the profits being earned by defendants in error at the time of the trespass, the witness Ruppe produced the books of account kept by them which contained detailed records of all credit sales and the daily cash receipts and some but not all of the operating expenses. The system used was to put through the cash register all monies received, transferring the total to the books from the register each night. (f. 366-7.) The books did not contain any merchandise account and of course no item from which the particular price any specific article sold for could be determined. From these it appeared that the cash receipts before the ouster steadily increased from $1829.15 in January, 1902, to $2455.90 in June. (f. 355.) The daily receipts averaged by months increased from $59.15 to $81.86 (f. 362.) Following the injury the receipts fell from $2455 in June to approximately half that amount for July and the

succeeding months and this amount slowly increased after the second move. (f. 376.)

Mr. Ruppe further testified that from thirty years' experience in the drug business in Albuquerque "in figuring the profits I have made in my business I figure that my business produced me an average of 40 per cent. gross" (f. 356). Asked to explain what he meant by the word "figured" as used in that answer he said: "My knowledge of the business permits me to state that I made 40 per cent on my sales." (357) Computing gross profits therefore on the basis of 40 per cent of the receipts from the business they increased from $731.00 in January to $982.00 in June. (f. 359) He then testified that his expenses which were composed substantially of fixed charges were about $434.00 per month: that during all the period both before and after the trespass they had invested in the business between $11,000 and $12,000 of capital and that the ordinary interest rates during the like period was substantially uniform at 10 per cent. (368-9, 378-9.) He also showed that it appeared from the books that the bad debts during the period would not exceed $200.00. (f. 419-20.)

From the data thus supplied it is apparent that the net profits could be computed with substantial accuracy both before and after the trespass. Upon cross examination however he testified that he made no book entries of goods purchased but kept the invoices on a bill file and when paid put

them in a drawer together with check stubs and cancelled checks and as these accumulated they were from time to time taken to his residence and finally destroyed as rubbish. (f. 416-17.) That not until the third trial of this case, nearly eight years after the injury was any suggestion made to him from any source that these papers might be needed and then he searched for them but was unable to find them as he had directed his family from time to time to destroy this rubbish he had no doubt that these papers had been burned.

Plaintiffs in error make no contention that the facts testified to by the witness Ruppe when taken with his books of account do not furnish accurate basis for the computation of profits; but instead they base their assignments of error upon this feature of the case on three points:

First: That it is indispensable to proof of profits generally that a system of accounts shall have been kept so complete and accurate in themselves that, being produced in court as evidence, an experienced bookkeeper can ascertain therefrom with accuracy the profits earned.

Second: That independent of the general rule, the New Mexico statute requires that a partnership shall keep such a set of books and therefore no other evidence is competent in that state to prove profits on behalf of a partnership.

Third: That it appearing that invoices of goods purchased, check stubs and cancelled checks used in the business of the defendants in error had

been voluntarily destroyed by them no matter for what reason and as these might have been of some value to plaintiffs in error in testing the accuracy of the testimony on the question of profits all evidence on that question must necessarily be rejected.

As to these items we respectfully refer the court to the opinion rendered below appearing on pages 530 to 532 of the record. These views fully sustain the proposition that the evidence offered by the defendant in error on the question of profits was competent and sufficient to sustain the verdict and that it was not necessary or indispensable that all this proof should come from books of account. In the language of the lower court:

"To hold otherwise would be tantamount to say that the failure of a merchant under such circumstances to keep a regular set of books deprive him of a remedy that the law gave him." (f. 1003.)

The contention of the plaintiffs in error that sections 2647 and 2650 of the Compiled Laws of New Mexico, 1897 regulating partnerships and prescribing kinds of account to be kept render incompetent for any purpose their books of account unless accurately kept and containing all the detail prescribed in the statute, is novel to say the least, and it is not strange that their counsel has been unable to find or cite any authority whatever sustaining such a contention, nor is it strange if the Supreme Court below, as he suggests, ignored the point. Their decision necessarily construes that

statute contrary to counsel's contention, which construction this court will follow. Santa Fe County vs. New Mexico, 215 U. S. 296.

It may be suggested in passing that no such objection was made to the books when offered in evidence or no such contention then called to the attention of the trial court (f. 351-386 to 8), and it was too late to move to strike them from the record for that reason after they had been admitted and the plaintiffs' case closed. (f. 553, p. 283.)

In the second place the record fails to establish that the defendants in error ever were partners. The complaint merely alleged that they occupied the building and that the property was theirs but the nature of their ownership was not alleged. Plaintiffs in error attempted to show upon the trial that the interest of Di Palma in the business was merely that he loaned money with an assigned interest in the business as security (f. 458-63), and they tried unsuccessfully to amend their answer at the last trial (57-66) their purpose being to show that the plaintiffs were not partners or even joint owners in the business. (561-3.)

But the more important point is that the plaintiffs in error have not sen fit to incorporate either these books or a summary of their contents in the record; not only that but refused the suggestions that they be included in the record. (f. 88.) The evidence therefore upon which the lower court acted in accepting the books as evidence not being before this court the ruling will not be reviewed.

We refer to this point on a subsequent page.

The foregoing points substantially dispose of the assignments of error presenting any question as to the merits. Some minor propositions presented by the brief of the plaintiffs in error may be specially noted.

POINT V.

The witness, Ruppe, was properly allowed to refresh his memory by consulting the Bill of Particulars as to goods destroyed.

It appeared that this bill of particulars, or memoranda, was made in the following manner: An inventory of the stock had been taken by the witness within a month prior to the fall of the building, and entered in a special book called the inventory or stock book. Sales had been made from the stock and some additions made to it. After the remains had been moved from the wreck to the new building, and during the following month, a list of the articles destroyed was entered in this book, being determined by the witness, Ruppe, in the following manner: If articles of stock were missed and they appeared in the inventory or subsequent purchases, the clerks were consulted as to their recollection of having sold those particular articles, or from that item of stock, and if they had no such recollection then the article was added to the list in the book as lost stock. (f. 301,8.) Items determined in this manner were continued to be added for a period of about a month. A bill of

particulars in the case was subsequently made by copying the list from this book. (f. 310.) The book itself was present at the second trial of the case and was left in court apparently with the other exhibits and could not thereafter be found, (f. 309-10), but the bill of particulars was a correct copy of the list (f. 311) and the witness he knew it to be correct. (f. 309.) The witness testified that he could by examining the bill of particulars thus authenticated refresh his recollection and testify to the articles lost and their value, which he did. (f. 313.)

The paragraph from the opinion of the New Mexico Supreme Court overruling the contention now made which is quoted in the brief of the plaintiff in error upon pages 75 to 77 fully answers the contention.

Plaintiff in error in their brief apparently concede the correctness of the views therein expressed but seek to distinguish this case by the contention that it was the duty of the injured party to take an immediate inventory of the remains of his stock after the injury, and that no other method of proof which falls short of absolute verity, will be permitted.

The method followed by the witness, Ruppe, in making up the list of property destroyed was approximately equivalent to taking an inventory, putting down the goods missing instead of the goods present, but deducting therefrom such goods as they remembered had been sold either

by himself or his clerks. In either case the ultimate reliance is on the honesty of the witness in making up the list of lost articles, for it matters not whether he put down those missing or those present; and we know of no rule that required him to take his inventory amidst the ruins of his old store or the first minute of his occupancy of the new store under penalty of relieving the destroyer from his liability. More or less confusion was necessarily attendant upon the condition confronting him, he was a week searching the ruins (f. 301), and a considerable period of time was necessary before an accurate inventory could be taken in new and temporary quarters. The question as to whether the method used in ascertaining the missing articles was the most reasonable one under all the circumstances was a question of fact addressed to the discretion of the trial court, and not open to review here.

POINT VI.

No question relating to the sufficiency of the books of account as evidence is before this Court for review.

(A) The plaintiffs in error themselves refused to include the contents of the books either by way of summary or excerpt or otherwise in the record, though specifically warned to do so upon the settlement of the bill of exceptions. Instead they sought to bring up the contents of these books by certifying the books themselves. The record shows

that the following took place upon the settlement of the bill of exceptions (f. 889):

> "The defendants ask the court to order Exhibits I, L. M. N-1 to N-5 inclusive, O-1 and O-2, offered and admitted in evidence, to be sent up by the clerk of this court to the Supreme Court for inspection upon the hearing of the appeal in this case; but the court refuses to order the same to be sent up, for the reason that in the opinion of the trial Judge, a statement of their substance, with so much of their contents as should be necessary to properly present any point at issue, could be agreed upon and settled by the Judge, and could be included in the record in place of the exhibits as omitted, and for that reason and because the exhibits in question would needlessly encumber the record and would impose on the Supreme Court the examination and consideration of facts refuses to make such order to which action of the Court the defendants excepted and still except."

The trial court was plainly correct in ruling that the 4th sub-division of Section 3031 Compiled Laws of New Mexico 1897 that books of account should be admissible in evidence "Upon inspection by the court to see if the books are free from any suspicion of fraud," referred necessarily to the trial court, conferring upon the trial judge to that extent the duty of passing upon a fact ultimately to be submitted to the jury, and that action not reviewable on writ of error.

The plaintiffs in error procured from the Supreme Court an *ex-party* order directing that the books be transmitted to that court, and certain books were apparently transmitted to the Supreme Court of New Mexico by the Clerk of the District Court, and have been likewise sent here; but these books are not authenticated by the trial judge or in any other sufficient manner, and their contents are not before this court for review. This fact alone is sufficient to dispose of all the assignments based upon the condition or contents of these books.

At the time that this record was made up Rule XXIX of the Supreme Court of New Mexico provided:

> "Voluminous exhibits and exhibits which are important only as to the fact of their existence or as to small portions of their subject matter or as establishing a negative fact shall not be included in full in the record unless the trial Judge shall so order; but a statement of their existence or substance with so much of their contents as shall be necessary to properly present the point at issue shall be agreed upon by the parties or settled by the trial Judge and included in the record in place of the exhibits omitted."

This rule provided an easy method of writing in to the bill of exceptions so much of the substance of these exhibits or such summary statement as to their contents as would enable the

court to pass upon the same. This summary statement could readily have been agreed upon by counsel or settled by the court, showing both affirmatively and negatively the contents of these books so far as they related to the issues in this case, but plaintiffs in error refused to accept the suggestion or procure such statement to be stipulated or settled, and the record is silent as to the contents of these exhibits.

Sub-division 3 of Rule VIII of the Rules of this court provide:

> "No case will be heard until a complete record containing in itself and not by reference all the papers, exhibits, depositions and other proceedings which are necessary to the hearing in this court shall be filed."

It is only where an inspection of the papers themselves, independent of their contents, becomes necessary that this court will examine the originals, and then only to the extent of such special inspection. Rule VIII, Sub-division 4, supra. It is manifest that this court will not search through a dozen large volumes of original accounts not incorporated into the record in order to ascertain what of their contents is important upon the review.

(B) Counsel for plaintiffs in error contends that the Supreme Court treated these books as not in the record, and therefore refused to consider their contents. If he is correct in that assumption

then the court was merely passing upon the question as to what was properly in the record, and as has been shown above had ample reason under the rules for construing the record as not containing these books and therefore refusing to consider their contents. If this be the correct construction of the opinion as contended for by counsel, then this court will not review the determination of the Territorial Supreme Court as to what the record contains.

Southwestern Brewery & Ice Co., vs. Schmidt, 226 *U. S.* 162.

Upon the other hand if the court did consider these books as books of account of a partnership required by the New Mexico statute to be kept and likewise considered the further question determined by the trial court that the inspection of these books required by the statute as a preliminary to their reception in evidnce was by the New Mexico statute addressed solely to the discretion of the trial court; both questions involved merely a construction of New Mexico statutes, and were necessarily decided against the contentions of the plaintiff in error in the court below, and are therefore not open to review in this court.

Santa Fe County vs. New Mexico, 215 *U. S.* 296.

The court could hardly have been expected to

notice especially each of the 176 assignments of error.

POINT VII.

There was no error in the Trial Court's Ruling as to the item of damages in the nature of interest.

(A) The trial court was not requested to instruct the jury that damages in the nature of interest should be limited to six per cent, nor was any attention called to that point by the exception to the instruction given. (f. 839.)

(B) The exception to evidence as to the prevailing rate of interest in New Mexico was in no way directed to this point, the proof then being offered was in connection with proof as to the net profits, and contemplated that reasonable interest at the prevailing business rate on capital invested should be taken into consideration as an item to be deducted in determining net profits. This is recognized by one of the authorities relied on here by plaintiff in error as a necessary deduction to that end.

> *Central Coal & Coke Co., vs. Hartman,* 111 *Fed.* 96 *at* 98-9. *(Brief* 93-4.*)*

Manifestly it was competent for that purpose.

(C) But the New Mexico statute quoted by counsel, Section 2550 Compiled Laws of 1897, does not fix the rate of six per cent as applicable to

damages in the nature of interest given for torts. On the contrary that statute in express terms prescribes the items to which that rate is applicable, and they are all matters of contract right.

Upon the second trial of this case the court instructed the jury in substance that the rate of interest applicable to case at bar was six per cent, and that they should allow interest at that rate upon any damages found by them. This instruction was excepted to and upon that appeal counsel for plaintiffs in error stated, on page 63 of their brief then submitted :

> "Six per cent interest per annum as an interest rate has not been made by statute applicable to any such demand as that of the plaintiffs against the defendants."

and he thereupon quoted the same statute now relied upon. He then contended that interest was not allowable at all as such, as a part of damages for a tort, but that the jury were permitted in their discretion to allow such further damages in the nature of interest, if they saw fit, *as to make the injured party whole for the time he was kept out* of the value of his property. *This contention then made was sustained by the Supreme Court of New Mexico, and a new trial ordered largely upon that ground.* This court will ordinarily follow the construction put upon a statute by the lower court.

The contention now made appears to be the reverse of the one then successfully followed. The only point presented to the trial court in this particular, as appears by the requested charge quoted in the brief, was that interest as damages was allowable only upon the value of the stock destroyed, and not upon the amount of profits prevented. It is the prevailing rule that interest as damages may not be computed on statutory, double or other punitive damages, but we know of no authority that would require a jury to refuse such damages upon one item of actual loss while permitting it upon another, nor has counsel cited any such authority in his brief.

(D) He contends that it is demonstrated that the jury allowed interest at a greater rate than six per cent because the informal and incomplete verdict first tendered by them, and refused by the court, fixed Five Thousand Dollars as the basis of damage upon which to compute interest. This argument is based upon the assumption that the jury could not, upon again retiring pursuant to the court's instructions, change the amount mentioned in the first verdict and agree upon a different amount as the basis for computation. The contrary is the rule. Until the verdict of a jury has been received and entered into the records of the court it is not a final verdict and may be reconsidered by the jury, and a wholly different verdict agreed upon.

Warner vs. N. Y. C. Ry. Co., 52 *N. Y.* 437.
22 *Enc. Pl. & Pr.* 967 *and cases cited.*

That the verdict as first rendered was ambiguous and improper is plain upon its face, and the court was not only justified but was its duty to direct the jury to reconsider the matter and complete their verdict. The final verdict rendered by them became the only verdict in the case, and this court can no more enter into a consideration of how the jury made it up than they could if the record did not contain the first verdict.

Warner vs. N. Y. C. Supra.
Blackley vs. Sheldon, 7 *Johns* 32.
Bull vs. McCrary, 94 *Ga.* 418..
Delafield vs. Ormsby Co., 124 *App. Div.* 621.

(E) Counsel contends that unless six per cent be fixed as the rate of interest then there is no limit on the amount which a jury can award as damages in the nature of interest. That, of course, does not follow. Where the statute does not fix or limit the rate of interest it is to be determined as a fact by the prevailing rates in business within the jurisdiction.

Young vs. Godby, 15 *Wall.* 562.

And this is necessarily limited by the statute of usury, which in New Mexico prescribes twelve

per cent as the maximum amount legally chargeable or collectable.

Section 2553-4 *New Mexico Compiled Laws* 1897.

POINT VII-A.

The exceptions to the Court's charge specially referred to in Point II of the brief present no error.

Paragraphs 4 and 21 of the charge are not inconsistent.

(a) They would not be inconsistent even if they read as quoted in the brief of the learned counsel for plaintiffs in error. They would then mean that the general burden of proof as to all allegations presented by the complaint was upon the plaintiff, to-wit to furnish a preponderance of evidence that the excavation under the wall of plaintiffs' lot was wrongfully made furnishing an efficient cause for the falling of the building and that the burden of proof was shifted to the defendant under such circumstances to show by a preponderance of evidence the affirmative defense set up in their answer to-wit that the building fell because of the removal of the lateral support.

To contend that the burden was upon the plaintiff under the facts of this case to show that the building did not fall because of want of lateral support to the lot was to contend that the burden

was upon the plaintiff not only to show an efficient wrongful act to the defendants calculated to produce a fall of the wall and building and actually followed by that result; but also to require them to *negative every other possible reason* which might have contributed to the result. Such a ruling would be manifest error against the plaintiffs below, although such instruction was in fact and in effect given by the court and that burden actually placed upon and sustained by the plaintiffs below.

(b) The alleged inconsistency of the two paragraphs from the charge quoted in the brief are produced by interpolating into paragraph four of the charge as given the words, "the preponderance of evidence" which do not appear upon the record, but are apparently added by counsel. In the original charge the only paragraph mentioning the burden of proof is paragraph 21 and the portion of paragraph 4 as it appears in brief of opposing counsel in italics making it seem that the burden was placed upon defendants below, does not appear in the original as given. (f. 829.)

POINT VIII.

It was not error to refuse the requested instruction set forth under Point VI of Defendant's brief

First because it contains the proposition that only such damage could be recovered as were "*directly* attributable to some wrongful act on the

part of the defendants," while the correct rule is that any item of damage not too remote whether the direct or indirect result is recoverable. For example in this case the direct injury was the destruction of the building and the goods of the defendants while flowing from this indirectly was the necessity and expense of removal and then followed the interruption of the business and the loss of profits. The proposal in question was apparently framed by the defendants and understood by the court as presenting their theory that these indirect items of damage were not recoverable.

Second: The proposed instruction directly singles out the witness Ruppe and endeavors in various ways to have the court insinuate that he has suppressed evidence and has exaggerated his loss and is generally unworthy of credit. In short it is open to all the vice that counsel found it necessary to disclaim when he said in his brief (pg. 136): "It is not open to the objection that it singled out and gave undue prominence to the testimony of a single witness." It manifestly is open to exactly that objection and more; that it singles out special features in the evidence of one witness and lays emphasis on that feature.

POINT IX.

It was not error to interrogate the witness La Driere as to early plans contemplating a building on both lots

One of the contentions being insisted on by plaintiffs in error upon the trial was that the party wall could well be built and was intended to be built without injury to defendants' building and that no wrong toward defendants was intended or expected. If it could be shown that Barnett had already prepared plans for a building covering both lots coupled with the testimony of Weinman as given that when information was brought to him that the building was falling he was not worried over it but finished the task then engaged upon and leisurely proceeded up the street, doing nothing after he reached there but looking on (f. 741-3) it would have well warranted the conclusion that the result had been planned. The evidence was clearly competent.

But assuming it was not so the answer of the witness that no such plans had been made as was remarked by the court below cured any error that would otherwise have occurred.

POINT X.

Technical errors, if any are found, should be considered as invited error.

As has already been stated this case has been four times tried before a jury. The issues and the facts were thoroughly understood before the last

trial. Yet upon the last trial eminent counsel representing each of the plaintiffs in error found it necessary to object on technical and often frivolous grounds to substantially every question asked of the principal witness for their opponents, resulting in the confusing of the witness and obscuring his answers before the jury. The court's attention is called to the record from pages 173 to 219, (f. 326-427 inclusive) wherein this course was persistently followed, pages 177 to 182 furnishing typical illustration.

Then in addition to their proposed instructions which were adopted by the court, and it is apparent that many were, ten pages of this record (20 of the record in the court below, (f. 842 to 862) are taken up with some 40 requests to charge presenting various propositions, many of them contradictory and inconsistent, for the court's ruling. In all 384 exceptions to ruiings of the trial court are presented by this record, 176 assignments of error in the court below and 110 presented upon this review.

We respectfully submit that this record presents a case tried for the purpose of inserting error into the record when it was plain that there being no hope of success on the merits the proper plan was to defeat defendants in error by wearing them out in litigation. The damage was inflicted on the 30th day of June, 1902, nearly 12 years ago; the suit was commenced August 26, 1902, and though vigorously followed by the injured parties they

are still kept out of remuneration for their injury. It must be evident to the court that rulings were being demanded of the trial judge upon every conceivable question that suggested itself to ingenious counsel and exceptions uniformly taken to each ruling.

Under these circumstances we respectfully submit that it would be impossible to conduct a trial covering several days without the trial court falling into some error but appellate courts under those circumstances will hardly be astute to search out error to reverse a judgment that does but tardy justice to the rights of the parties.

POINT XI.

The judgment of the Supreme Court of New Mexico should be affirmed with costs in this Court and in the Court below.

OWEN N. MARRON,
FRANCIS E. WOOD,
A. B. MCMILLEN,
Attorneys for Defendants in Error.

WEINMAN *v.* DE PALMA.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 173. Argued January 20, 1914.—Decided February 24, 1914.

Where the owner of demised premises makes a contract with an adjoining owner for construction of a party wall, which contract cannot be carried out according to its terms without entry upon the demised premises and undermining the tenant's wall, and the adjoining owner, or his servants, in performing the contract commit such a trespass upon the tenant's possession and undermine the wall, the contract is evidential of a command or approval of the trespass by the landlord, such as to render him liable severally, or jointly with the adjoining owner, in an action by the tenant for the resulting damages.

Where a trespass results in the destruction of a building with consequent interruption of a going business, the loss of future profits—

reasonably certain and proved with reasonable exactitude—is a proper element for consideration in awarding compensatory damages.

Where the contractor is required to follow instructions of the owner he is not such an independent contractor as to relieve the owner of liability for his acts.

The "independent contractor" doctrine does not apply where the work that the contractor does amounts in itself to a nuisance or necessarily operates to destroy the property of another.

16 New Mex. 302, affirmed.

THE facts are stated in the opinion.

Mr. Neill B. Field for plaintiffs in error.

Mr. F. E. Wood, with whom *Mr. Owen N. Marron* and *Mr. A. B. McMillen* were on the brief, for defendants in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

In November, 1901, Weinman, one of the plaintiffs in error, being the owner of a building and lot of land in Albuquerque, New Mexico, leased them to defendants in error for a term of two years, to commence in December, following. They entered into possession, and occupied and used the building in their business of prescription and retail druggists. Plaintiff in error Barnett was the owner of an adjoining lot and building. Some time in May or June, 1902, while the Weinman building was occupied by defendants in error, Barnett took down and removed his building, including the wall adjacent to the Weinman building. The east wall of the latter was an old adobe wall that stood close to, but perhaps a few inches away from, the easterly boundary line of the lot. In May, 1902, Weinman and Barnett entered into an agreement in writing, whereby Barnett was to construct a party wall,

to stand one-half of its full thickness upon each lot; the footing course to be 40 inches wide; the foundation wall to be 18 inches thick from the top of the footing to its full height, where it was to receive the first floor joists; the wall above that to be of less thickness. It was stipulated that Barnett should be permitted to take down any part of the east wall of the Weinman building as might be necessary in order to locate the new wall centrally over the property line, and if through his fault damage should be done to the Weinman building, he was to make it good. In the execution of this agreement, it was necessary to undermine the east wall of the Weinman building. Barnett made an agreement with one Grande, a general contractor, by which the latter was to do the excavation and stone work according to plans and specifications, and as directed by La Driere, a superintendent who was in Barnett's employ. Grande proceeded under La Driere's direction to do the work. It would seem that the purpose was to excavate for the party wall in sections, so that support for the Weinman building should not at any time be entirely lacking. On or about June 30, the contractor having excavated for a space about 5 feet in length along the line between the two lots at the northeast corner of the Weinman building, and extending under the east wall of that building for approximately 12 inches, the wall fell, damaging the stock-in-trade and fixtures of defendants in error, and rendering the building untenantable. They removed what remained of their stock and fixtures to another and less desirable location, and carried on their business there, up to the time their lease of the Weinman lot and building would have expired by its terms. After the wall fell, Weinman made demand for the rent payable by the lease for the month of July, 1902, and, defendants in error having refused to pay it, Weinman took possession.

Defendants in error brought suit against both Weinman

and Barnett in the district court of one of the counties of the then Territory of New Mexico. The action was in the nature of an action of trespass, and damages were claimed for the destruction of parts and injury to other parts of the stock-in-trade and fixtures, for the being compelled to remove to a less favorable location at considerable expense, and for the loss of profits in the business. (There was also a claim of damages for eviction and the loss of the leasehold, but this was afterwards abandoned.)

Answers were filed, and there were subsequent amendments to the pleadings, but it is not necessary to recite them.

The action has been at least three times tried by jury, and three times reviewed by the Supreme Court of New Mexico. Upon the first trial a verdict was directed in favor of defendants, and the Supreme Court reversed the judgment and remanded the cause for a new trial. 13 New Mex. 226. The second trial resulted in a verdict and judgment for plaintiffs, which was reversed because compensation for loss of profits and for goods injured was included without sufficient evidence to sustain this part of the recovery. 15 New Mex. 68. At the last trial, the proof was to some extent supplemented, and there was a judgment in favor of plaintiffs for $7,738, based upon the verdict of a jury for that amount. On appeal, the Supreme Court found error only with respect to the proof as to damaged goods, and required plaintiffs to elect whether they would file a *remittitur* of $770 on this account, or submit to a new trial. 16 New Mex. 302. They chose the former alternative, and the judgment was affirmed for the reduced amount. The present writ of error was then sued out.

The record is voluminous. In the territorial Supreme Court, 105 assignments of error were filed in behalf of Barnett and 68 in behalf of Weinman. In this court the assignments of error are 110 in number. We shall make no

effort to deal with them in detail. The points that seem to require mention are the following:

We agree with the Supreme Court of New Mexico that where the owner of demised premises makes a contract with an adjoining owner for the construction of a party wall, which contract cannot be carried out according to its terms without entry upon the demised premises and an undermining of the tenant's wall, and the adjoining owner or his servants in the performance of the contract do commit such a trespass upon the tenant's possession and undermine the wall, the contract is evidential of a command or approval of the trespass by the landlord, such as to render him liable severally, or jointly with the adjoining owner, in an action by the tenant for the resulting damages. *Lovejoy* v. *Murray*, 3 Wall. 1, 9; *Northern Trust Co.* v. *Palmer*, 171 Illinois, 383, 388; *Collins* v. *Lewis*, 53 Minnesota, 78, 83; *Snow* v. *Pulitzer*, 142 N. Y. 263, 268.

In our opinion, the court correctly held that where a trespass results in the destruction of a building, with consequent interruption of a going business, the loss of future profits (these being reasonably certain and proved with reasonable exactitude), forms a proper element for consideration in awarding compensatory damages. *Allison* v. *Chandler*, 11 Michigan, 543, 550; *Schile* v. *Brokhahus*, 80 N. Y. 614, 620; *Snow* v. *Pulitzer*, 142 N. Y. 263, 270; *Chapman* v. *Kirby*, 49 Illinois, 211, 219; *City of Terre Haute* v. *Hudnut*, 112 Indiana, 542, 552; *Fibre Co.* v. *Electric Co.*, 95 Maine, 318, 327. And see *Anvil Mining Co.* v. *Humble*, 153 U. S. 540, 549; *Brown* v. *Honiss*, 74 N. J. Law, 501, 514.

We agree also with the court below that upon the last trial there was legitimate evidence upon which to base an allowance of damages for loss of profits, and no substantial error in the rulings on evidence or in the instructions to the jury upon the subject.

It is contended that plaintiffs in error are not responsible

for what was done by Grande in building the party wall because he was an independent contractor.

But the evidence showed that he was required to follow the instructions of La Driere, who was Barnett's agent, and that La Driere was in fact in charge of the work. For this reason it was properly held that Grande was not an independent contractor. *Railroad Co.* v. *Hanning*, 15 Wall. 649, 657; *Singer Mfg. Co.* v. *Rahn*, 132 U. S. 518, 523.

Nor does the "independent contractor" doctrine apply where the work that the contractor is to do of itself amounts to a nuisance or necessarily operates to injure or destroy the property of plaintiff. *Chicago* v. *Robbins*, 2 Black, 418, 426; *Robbins* v. *Chicago*, 4 Wall. 657, 678.

The other points that are raised have been examined, and we find no material error. They have been sufficiently discussed in the court below, and require no particular mention here.

Judgment affirmed.